INSOLVENCY LITIGATION FUNDING - IN THE BEST INTERESTS OF CREDITORS?

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1 Glossary of Terms

After the Event (ATE) Insurance: an insurance policy which covers one party against the risk of having to pay the opposing party's legal costs in the event that the action fails.

Assignment: in the context of this report, an assignment is taken to be an assignment of a cause of action. The assignment may be of a cause of action which vests in the insolvent estate, such as an action for breach of duty. Alternatively, in the corporate context, since 1st October 2015 an administrator or liquidator may assign an office-holder cause of action under section 246ZD of the Insolvency Act 1986.

Conditional Fee Arrangements (CFAs): agreements between a lawyer and client where the lawyer receives payment of his or her own fees only if the action is successful. The agreement will usually also provide for the lawyer to benefit from a percentage uplift when the case is won limited to 100% of base fees and subject to assessment by the court at the request of the paying party.

Funder: a third party with no connection to the legal dispute but who funds, at least some part of, the costs of the action.

Insolvency Litigation: actions brought by liquidators, administrators and trustees in bankruptcy.

Jackson Reforms: reforms recommended by Lord Justice Jackson in his Review of Civil Litigation Costs and brought into effect by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

2 Foreword

I have had the privilege in recent years of being entrusted by various stakeholders in the UK's insolvency firmament to look at various different practical issues. I was extremely pleased to be approached in the Summer of 2019 by Manolete Partners plc to conduct research in order to assess the current state of play in the insolvency litigation funding market. Insolvency litigation, and how to fund it, has been a live issue for a number of years. I have twice previously looked at the law and practice in this area reporting my empirical findings in 2014 and 2016. The legal framework has since moved on. This report attempts to assess where we are now, in relation to what is happening in practice, and considers what insolvency practitioners should be doing when assessing what to do with a potential legal cause of action.

I am most grateful to Manolete Partners plc, and in particular its CEO, Steven Cooklin and non-executive director, former Chief Bankruptcy Registrar Baister. Although ensuring my report has been produced entirely independently they have assisted me with their experienced insights and most generously with access to confidential information about Manolete Partners plc's case load. In addition, it is important to note that the project would not have been possible without the active support of the ICAEW and IPA. My thanks go in particular to the ICAEW's Bob Pinder and the IPA's Michelle Thorp. I am also extremely grateful to all the insolvency professionals who responded to my online survey and particularly to the stakeholders who kindly gave up their valuable time to be interviewed. A large number of insolvency practitioners, insolvency lawyers, funders, insurers and brokers were most generous with their time, experiences and wisdom.

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3 Introduction

The purpose of this project is to assess how insolvency litigation is currently funded and to highlight concerns or significant issues which face different stakeholders. The main theme which runs through this report is the duty of insolvency office holders to exercise their powers for the benefit of creditors.

The report begins with an outline of the recent history of the legal framework governing how insolvency litigation has operated up to the present day.

An assessment of legal and practical issues affecting how insolvency practitioners ("IPs") carry out their duty to act in the best interests of creditors is then made.

This is followed by an examination and analysis of qualitative and quantitative data which considers: 1) the results of an online survey of IPs carried out between September and December 2019; 2) certain data kindly made available by Manolete Partners plc which sheds light on the amount of insolvency claims which require funding; and 3) the views of various IPs and other stakeholders interviewed between October 2019 and February 2020.

From the above data a number of perceived issues with how the current system operates are identified and possible reforms are suggested which might lead to an increase in returns to creditors.

4 Outline of the recent history of the legal framework governing insolvency litigation

The Jackson Reforms[1] came into force in 2013 under the terms of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). LASPO made changes both to the law and procedure governing how civil litigation is conducted in the UK. It generally abolished the right for successful claimants to claim, from a losing defendant, any uplift on a conditional fee agreement ('CFA') and the premium payable for after-the-event ("ATE") insurance (a policy taken out to safeguard against the possibility of suffering an adverse costs order if the claim is unsuccessful).[2] Jackson LJ had observed, in general terms, that the way CFAs had operated (often with 100% uplifts and deferred ATE premiums) was the cause of disproportionate costs incurred by successful claimants. His Lordship had found that in the cases he had analysed, claimant costs in CFA cases had ranged from between 158% and 203% of the damages awarded.[3]

In recognition of the unique public policy issues involved, insolvency litigation[4] was granted an exemption from the LASPO reforms, initially for two years but subsequently extended[5] for a further year. The insolvency "carve-out" came to an end in April 2016.[6]

The Jackson Reforms were introduced with little or no consideration of their impact upon insolvency litigation.[7] Although the Government committed itself to a Post

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[1] The Reforms are based upon Lord Justice Jackson's recommendations found in *Review of Civil Litigation Costs: Final Report* TSO (December 2009) (see also the *Review of Civil Litigation Costs: Preliminary Report Volumes One and* Two TSO (May 2009) and the Government's subsequent consultation *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations* (Cm 7947, November 2010) and its response to the results of that *consultation Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations - The Government Response* (Cm 8041, March 2011).

[2] These specific changes were made by amendments to the Access to Justice Act 1999.

[3] *Review of Civil Litigation Costs: Final Report* TSO (December 2009) at paragraph 2.20. The cases his Lordship considered do not appear to be insolvency cases.

[4] In this context insolvency litigation in general terms refers to litigation brought by liquidators or administrators of companies or trustees in bankruptcy. See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provision) Order 2013 SI 2013/77 art 4 and the Ministerial Statement dated 24th May 2012 by the then Minister of Justice Jonathan Djanogly.

[5] See the written statement by Lord Faulks QC, the Minister of State for Civil Justice on 26th February 2015.

[6] The announcement was made on 17th December 2015 by Lord Faulks QC, the Minister of State for Civil Justice and may be found at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-12-17/HCWS420/.

[7] Although a number of Parliamentary Written Questions were answered in terms which suggest the issue of insolvency litigation was considered in the Parliamentary LASPO Impact Assessment, there is no evidence that that was in fact the case (see for example, the answers to

Implementation Review of LASPO between April 2016 and April 2018, that Review again did not address the effect of the reforms specifically on insolvency litigation.[8] Independent research was published by the author in both 2014[9] and 2016[10]. For an in-depth consideration of the history of, and public policy considerations involved in, support for insolvency litigation, the reader is directed to the two previous reports.[11] The aim of both the 2014 and 2016 reports was to assist Government policy making by providing evidence as to how insolvency litigation was funded at that time and the likely effect that the Jackson Reforms would have on the market. The two reports recognised a developing third party funding market but considered the introduction of the Jackson Reforms to insolvency litigation would lead to a significant reduction in the funds brought into insolvent estates and distributed to creditors.

The estimated value of insolvency claims brought under the pre-Jackson regime was likely to be around £1bn with approximately half of this figure finding its way back to insolvent estates to cover costs and be distributed to creditors.[12] The value of the third party funding market was estimated as being approximately 10% of that figure.[13]

The results of a survey of insolvency practitioners carried out in December 2015, just prior to the Jackson reforms taking effect on insolvency litigation, showed the following: 86% of respondents believed that less money would be returned to creditors as a result of the Jackson reforms; 49% stated they would stop or decrease the amount of insolvency litigation they would initiate; 54% said they would use third party funders to help fill the gap caused by the loss of recoverability of CFA uplifts and ATE insurance premiums.[14]

The methodology of the previous two reports relied upon looking at data held by the Insolvency Service, a survey of the profession, a series of interviews with various

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Written Questions 13344, 13345, 13342, 13343, 13333, 15406 provided by Dominic Raab MP, Parliamentary Under-Secretary (Ministry of Justice) in November 2015).

[8] See paragraph 1.2 of the Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) Civil litigation funding and costs February 2019 found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf.

[9] *The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation* commissioned by R3 (with the support of ACCA, ICAEW, ICAS, IPA, JLT Specialty Ltd, Moon Beever and Moore Stephens LLP) ("the 2014 Report") which may be found on the R3 website.

[10] *Insolvency Litigation and the Jackson Reforms – An Update* R3 (with the support of ACCA, ICAEW, ICAS, ILA, IPA, JLT Specialty Ltd, IRS and Willis Towers Watson) ("the 2016 Update") which may be found on the R3 website.

[11] See Sections 3 and 4 of the 2014 Report and Section 3 of the 2016 Update.

[12] See the 2016 Update at 2.1B.

[13] See the 2016 Update at 2.2D.

[14] See Appendix B of the 2016 Update.

stakeholders and an analysis of data provided by the principal UK insolvency litigation funder, Manolete Partners plc. Due to changes made by sections 120 and 121 of the Small Business, Enterprise and Employment Act 2015, the requirement for any office-holders to pursue the sanction of the Insolvency Service prior to taking legal action was abolished on 26th May 2015. The source of the Insolvency Service data used for the previous two reports therefore no longer exists. In an attempt to replicate the basic methodology, as far as possible, of the previous two reports, the current research relies upon a survey of the profession, an analysis of up-to-date data held by Manolete Partners plc and a series of stakeholder interviews.

The next section provides an assessment of legal and practical issues affecting how insolvency practitioners address their duty to act in the best interests of creditors in the context of insolvency litigation.

5 Insolvency Practitioner ("IP") Duties when realising a Cause of Action

5.1 The IP as a Fiduciary

An IP is a fiduciary,[15] a person who has undertaken to act for, or in the interests of, another and whose activities can be supervised in equity so as to prevent their being used for personal advantage.[16] In *Bristol & West Building Society v Mothew*[17] Millett LJ stated that:

> "The distinguishing feature of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or for the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations".

In an insolvency context, the fiduciary duties owed by an IP include the duty to act bona fide within the IP's powers and a duty to act in the best interests of the company's creditors as a whole.[18]

5.2 IPs and Remuneration

An IP will normally seek to be remunerated and, as a fiduciary, can only claim remuneration which has been authorised.[19] The IP will have to justify the claim. This is one aspect of a fiduciary's obligation to account. Money retained by the IP out of the estate's property is not available to the creditors. The IP must account for it by showing that he or she ought to be allowed to retain it. He or she must explain the nature of the tasks which have been undertaken and the reasons why they were carried out in that way as well as the amount of time and effort spent upon them. If an IP agrees with the insolvent estate's creditors that he or she should be remunerated according to a percentage of realisations, and so in one sense, is funding the action through his or her own time, this does not constitute the IP a "commercial funder".[20]

5.3 Duty of Care to Creditors

In addition to acting *bona fide* and within their powers, the actions of, and decisions made by, IPs will be judged according to the standard of the reasonable person acting in his or her own affairs. They are expected to display reasonable commercial

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[15] This was the starting point from which Ferris J developed his judgment in *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638.
[16] H Anderson, *The Framework of Corporate Insolvency Law* (Oxford, 2017) paras 11.08-11.12.
[17] [1998] Ch 1 at 18.
[18] *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112.
[19] See Rules 18.15 to 18.38 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024).
[20] *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch) at [44].

judgement[21] and not act regardless of expense. Transactions which incur high costs will be subject to close scrutiny.

An IP owes a duty to act with reasonable care and skill. In this regard the standard by which he or she is judged is the standard of a reasonably skilled and careful practitioner.[22] If an IP decides to sell a company's business or a particular asset, the IP owes a duty of care in relation to the choice of the time to sell and the taking of appropriate available valuation and marketing steps calculated to achieve the best price.[23]

Allegations of breach of fiduciary duty and the duty of skill and care were upheld by the court in *Brewer v Iqbal*.[24] The IP had breached his fiduciary duty by failing to act single-mindedly for the company. He had failed to take account of matters which he should have taken into account whilst taking into account matters he should not have taken into account. He had failed in this duty to exercise reasonable skill and care with regard to marketing and valuing of the company's assets.

IPs may be in breach of duty if they fail to give proper consideration as to how they ought to exercise their discretionary powers. The court in *Brewer* recognised that, in certain circumstances, a failure to take professional advice will amount to a flawed decision-making process.[25]

5.4 Duties of IPs when realising a Legal Cause of Action

When an IP becomes aware of a possible cause of action capable of being pursued in order to benefit a company's creditors, he or she has a wide discretion as to what to do. The IP will need to be familiar with the circumstances of the case. It will be important to consider whether the proposed defendant has sufficient wealth to satisfy any possible successful judgment. The IP will need to consider the likelihood of success of the action. The insolvent estate may have sufficient funds within it to finance an action (including the contingent cost of an indemnity for any personal liability incurred by the IP if the case is lost). In such cases, IPs may legitimately use those funds to take action, provided that they exercise proper commercial judgement, consider whether they would hazard their own money in the way planned and keep the costs under review to ensure that they are justified. On the other hand, and very much more commonly in an insolvent estate, it may be impecunious. Whether or not there is funding available in the insolvent estate, it will be important to consider the options available.[26] They will usually include the following (or a combination of them):

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[21] *Re T & D Industries plc* [2000] 1 WLR 646.
[22] *Re Charnley Davies Ltd (No.2)* [1990] BCC 605.
[23] See e.g. *Davey v Money* [2018] EWHC 766 (Ch); [2018] Bus. L.R. 1903; *Silven Properties Ltd v Royal Bank of Scotland Plc* [2000] BCC 727.
[24] [2019] EWHC 182 (Ch); [2019] BCC 746.
[25] See *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 which was followed in *Brewer*.
[26] The cost of issuing proceedings itself may be an issue especially where the estate is impecunious (see SI 2008/1053 Civil Proceedings Fees Order 2008 (SI 2008/1053), Schedule 1 of which states the fee for commencing an action in the High Court or County Court where, for

i) do nothing;
ii) ask creditors to fund the action;
iii) fund the action themselves or get their IP firm to do so;
iv) enter into a CFA with their legal team with or without ATE insurance;
v) enter into a funding agreement or assignment of the proposed cause of action with a third party funder; or
vi) enter into a damages based agreement.[27]

If an IP is uncertain which course to follow, in many situations he or she may attempt to seek directions from the court but it would seem unlikely that the courts will help in this context. When there is a decision to be made by an IP which is essentially a commercial decision the IP will not be allowed to use the court "as a sort of bomb shelter"[28]. An IP, when acting as liquidator or trustee in bankruptcy no longer requires the consent of creditors (or the Insolvency Service) prior to taking legal action.[29] The IP might be wise to take account of the views of the creditors prior to taking legal action or assigning a cause of action but ultimately he or she is responsible for how the discretionary power is exercised.

Any course of action should be intended to lead to an advantage to the creditors. Whatever the IP decides to do it is plainly correct that the IP should take more account of the views of the creditors than the directors of the company.[30] If the only advantage to the creditors is the indirect benefit that the IP's fees will be covered, that would appear to fall short of what is required of the IP.[31]

5.4.1 Do Nothing

Although a number of IPs are risk averse, they must be aware that if they decide not to pursue the realisation of a cause of action, they may be failing in their duties to creditors unless they have made a documented, reasoned and reasonable decision not to pursue the claim. It is not open to an IP not to investigate potential causes of action. Where an IP has been appointed, effectively by those in control of a company, the IP must not

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example, if the claim is for over £200,000, the fee is £10,000). It is not uncommon for IPs themselves to fund such fees out of their own money.

[27] There is no evidence that any IP has yet entered into a damages based agreement. There is perceived to be an insuperable conflict of interest facing lawyers who agree to such agreements. If a lawyer wishes to be benefit from a percentage of any proceeds of an action, there is the concern that the IP would not be acting in the best interests of the creditors by agreeing to such an agreement rather than a more conventional conditional fee agreement. Whatever the reasons for the widespread reluctance to adopt damages based agreements, they are not used in insolvency practice and so will not be considered further in this report.

[28] *Re T & D Industries plc* [2000] 1 WLR 646 at 657 per Neuberger J.

[29] See sections 120 and 121 of the Small Business, Enterprise and Employment Act 2015. Although a liquidator has always had the power to dispose of company property, which would include assignment of a company action, this power did not include office-holder actions until section 118 of the 2015 Act permitted assignment of such actions.

[30] *Faryab v Smith* [2001] BPIR 246 per Robert Walker LJ at [42].

[31] *Faryab v Smith* per Judge LJ at [49].

accept the opinions and views of directors but must exercise independent judgement in deciding what to do with a company's assets.[32]

An IP has a statutory duty to report on potential unfit conduct by directors under the Company Directors Disqualification Act 1986.[33] If there is evidence of such misconduct, the IP must consider, and take appropriate advice, as to whether a cause of action is available against the directors, which may lead to some benefit to the company's creditors. If an IP is aware that disqualification proceedings are to be taken against a director by the Secretary of State, the IP may wish to liaise with the Secretary of State's team as to any likelihood that a compensation order under section 15A of the Company Directors Disqualification may be pursued. This may prove to be an efficient way to effect a return to the company's creditors with little or no cost to the insolvent estate.

If there is a possible cause of action but the IP is considering doing nothing about it, it would make sense for the IP to offer a full assignment of the action for a single one-off payment to a funder. Even if the funder passes on the offer, the IP will be able to demonstrate that a genuine attempt to realise its value has been made.

5.4.2 Ask Creditors for Funding

Although once commonplace, it has become reasonably rare in the past twenty years or so, for a creditor to fund insolvency litigation. It remains a possibility and an IP will usually approach the insolvent estate's creditors to see if they are prepared to fund any proposed action. Most creditors are reluctant to risk further sums when they already stand to lose money in the insolvency. In a previous research report,[34] it was suggested that the UK might consider adopting a version of the Australian system where creditors are rewarded with an increased return if they decide to fund insolvency litigation. It is difficult to understand the reluctance of the UK Government to consider the introduction of such a procedure.

Prior to the abolition of the Crown's preferential status by the Enterprise Act 2002, Crown creditors, such as the predecessors to HMRC were often willing to fund insolvency litigation. In recent years, HMRC has only supported financially a relatively small number of such cases (usually limited to cases involving allegations of fraud). It might be that with the imminent reintroduction of HMRC as a preferential creditor[35] this may change. As the proceeds of most litigation will form part of the insolvent estate, HMRC, as a preferential creditor, is likely to be the primary recipient of any dividend. It would therefore make a great deal of sense for HMRC to return to its pre-Enterprise Act practice of routinely funding insolvency litigation. There is also the possibility of negotiating a "matched funding" agreement along with a commercial funder.

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[32] *Brewer v Iqbal* [2019] EWHC 182 (Ch); [2019] BCC 746.

[33] Company Directors Disqualification Act 1986, section 7A.

[34] See Section 5 of the 2016 Update.

[35] HMRC is due to regain its preferential status, at least for some taxation debts, from 1st December 2020 (see *HM Treasury Budget 2020 Statement* HC 121 March 2020 at paragraph 2.261 - Protecting your taxes in insolvency.

It is possible that secured creditors may occasionally fund certain actions by IPs. The reintroduction of the Crown preference will most likely act as a deterrent to other unsecured creditors. Absent the adoption of a form of the Australian system of rewarding creditors who provide funding support, the lion's share of any proceeds of any successful action are likely to go (after costs) to HMRC.

5.4.3 IP Firm Funds the Action

There appears to be a small number of IP firms who engage in funding insolvency actions being brought by their own IPs (that is IPs who are partners in or employed by those firms)[36]. There are some potential concerns and dangers in doing so, some of which are highlighted by the case of *Burnden Holdings (UK) Ltd v Fielding*.[37] The court has a jurisdiction to award costs against a third party under s. 51 of the Senior Courts Act 1981.[38] The court looks to do what is just in the circumstances. It will generally not impose liability for costs on what are termed "pure funders", which means those who have no interest in the litigation, who are not funding it as a matter of business and do not look to control the action. If the non-party to the action looks to exercise control over it or is to benefit from a successful conclusion, justice will usually require, in the event the action fails, that the non-party pays the successful side's costs. It will be acting as a "commercial funder". [39]

The principle applicable is that if an IP firm funds an action and looks to benefit from that funding, it will usually be ordered to pay adverse costs if the action is lost. In *Burnden*, the IP firm funded part of an action and, had it been successful, would have recouped approximately 2.25 times the funding provided. The court found it to be acting as a "commercial funder" and was therefore liable for a part of the adverse costs of the successful party.

There is also a potential issue around conflict of interest and duty if an IP's own firm acts as a funder for one of the IP's actions. It would seem that an IP in such circumstances should consider obtaining offers from third party funders to ensure that the insolvent estate and its creditors are getting the best deal available in the market.

If the basis for remuneration of an IP, in an impecunious insolvent estate, is a percentage of realisations, he or she is not, without more, constituted as a "commercial funder".

Similarly, if an IP firm (or solicitors' firm) supports an action by relatively "low-level"[40] funding, which is limited in nature and common within the profession, such funding

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[36] The suggestion that an IP might make a payment as security for costs in an action was described by Marcus Smith J in *Absolute Living Developments Limited (In Liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch) at [33] as "entirely unusual" and the prospect of such payments being made as "theoretical or fanciful".

[37] [2019] EWHC 2995 (Ch).

[38] For the general principles the court uses when considering exercising this jurisdiction see: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC) at [25].

[39] [2019] EWHC 2995 (Ch) at [6].

[40] [2019] EWHC 2995 (Ch) at [47].

support will not constitute the IP firm as a "commercial funder". They will be seen as a "pure funder" and acting merely to facilitate access to justice for the insolvent estate.[41]

5.4.4. CFA (with or without ATE)

Since the Jackson Reforms were applied to insolvency litigation, any CFA uplift (commonly, but not invariably set at the maximum permissible100% of the lawyers' base costs[42]) and ATE premium are no longer separately recoverable from a losing defendant.[43] Such costs must be paid out of any damages awarded or settlement reached.

The obvious risk from an IP's viewpoint in such cases is that the recovery may not be sufficient to cover the legal team's fees (and disbursements) and any ATE premium. The more complex or drawn-out a matter becomes the more likely these fees are to increase. Even in reasonably large claims the IP may find that there is little left for creditors once the legal team's fees, the ATE premium and the IP's own fees are paid. The IP must, based up the best advice available, make a professional judgement as to whether this mode of funding the action is likely to be in the best interests of the creditors.

The IP needs to consider carefully the terms of any CFA (and ATE policy). In *Stevensdrake Ltd (t/a Stevensdrake Solicitors) v Hunt*[44] a claim was successfully settled for a sum of £1.9m which would have been more than sufficient to cover legal costs (and the CFA uplift). The money was never recovered as the defendant became bankrupt. The terms of the CFA expressly provided for the IP to be personally liable for the legal costs (and uplift) if the action were a success. Under the terms of the CFA, the action had been a success even though no recovery had been made. The liability to pay was not limited by reference to funds available in the liquidation. The CFA imposed personal liability to pay the legal fees on the IP regardless of actual recoveries.

The case highlights a real risk for IPs. It suggests an IP needs to read carefully and fully understand the terms of a CFA (and indeed an ATE policy). It would appear wise for IPs in such cases to take independent legal advice on their potential personal liability. It would not always be sensible to rely upon any advice as to the effect of any CFA contract which is provided by the legal team with whom the CFA is being entered. That legal team is not in a position to provide independent advice on the terms of the CFA. If the IP has not fully understood the implications of the CFA's terms, it seems it would be arguable

[41] [2019] EWHC 2995 (Ch) at [41].
[42] See paragraph 3 of the Conditional Fee Agreements Order 2013 (SI 2013/689) which limits the percentage uplift legally possible under section 58 of the Courts and Legal Services Act 1990 to 100%.
[43] See paragraph 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 12) Order 2016 (SI 2016/345) which came into force 6th April 2016 and brought litigation by administrators, liquidators and trustees in bankruptcy within the limitations of sections 44 and 46 of LASPO 2012.
[44] [2017] EWCA Civ 1173; [2017] BCC 611.

that the legal team has breached its duty to the IP by not fully explaining its terms and its practical implications.[45]

ATE insurance is commonly purchased by IPs (and funders) when taking legal action of any significance. It has been stated judicially that unless there is evidence to the contrary, a properly drafted ATE policy provided by a substantial and reputable insurer will be seen by the courts as a reliable source to satisfy any application for security of costs.[46] Despite this general approach, the court has recently commented, in *Rowe v Ingenious Media Holdings plc*,[47] that an ATE policy with a number of exclusions contained within it may not be seen as adequate security for costs. As Nugee J commented:

> "The fundamental difficulty is that an ATE policy, as recognised on both sides, is not designed as security for costs. It is designed as cover for the Claimants, and like all insurance, insurers are astute to protect themselves from behaviour of the insured which changes the risk they have agreed to undertake… I suspect the problems that have been identified could be solved, and there may be something to be said for litigation funders and ATE insurers to seek to develop a form of policy that could both act as insurance for claimants and sufficient protection for defendants."[48]

A funder with the benefit of such an ATE policy may still need to provide sufficient assets to cover an order for security of costs. It would appear sensible for an IP to consider closely the terms of any ATE policy and negotiate terms which will do what the IP needs it to do.[49]

The decision to instruct solicitors and counsel is simply a decision to sub-contract work which IPs are entitled and (at least in theory) able to do themselves. In *Jacob v UIC Insurance Co Ltd*[50] the court explained that whenever IPs chose to retain their own firms for work in an insolvency procedure they ought to negotiate the best rates possible. IPs must look to achieve the best value for the creditors. This principle must also apply to any decision as to how to take legal proceedings. It would cover any decision to instruct a legal team. It would similarly cover any decision to engage with third party funders. The IP must decide which route would bring best value to the estate.

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[45] *LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch); [2019] 1 BCLC 38 at [46].

[46] Under CPR 25.12 and 25.13. See *Geophysical Service Centre Co v Dowell Schlumberger (ME) Inc* [2013] EWCH 147 (TCC) at [15] and *Premier Motorauctions Ltd v PricewaterhouseCoopers* [2017] EWCA Civ 1872; 2018 1 WLR 2955 at [31]. A court will be alive to the possibility of an anti-avoidance clause which permits the insurer to avoid the insurance contract on the basis of non-disclosure or misrepresentation.

[47] [2020] EWHC 235 (Ch). To similar effect see the comments made by the court in *Re Hotel Portfolio II UK Ltd* [2020] EWHC 233 (Comm).

[48] [2020] EWHC 235 (Ch) at [136 -138].

[49] See the commentary in A Jay "Recent developments in litigation funding" (2019) 6 *Corporate Rescue and Insolvency* 218.

[50] [2006] EWHC 2717.

The IP must decide which funding model (or combination thereof) to adopt as well as negotiate appropriate terms. This may involve considering the percentage uplift on any CFA and any percentage of realisations to be retained by a funder. In reaching that decision, the IP must consider whether there is the need to test the market. The IP must be able to support with reasons the decision made if it is later questioned. The IP must decide what to do with the IP's fiduciary obligations firmly in mind.

5.4.5 Engaging with a Funder or Assignee

Decisions facing an IP are generally left to the commercial judgement of the IP.[51] In the context of assigning a cause of action the Court of Appeal, in *Faryab v Smith*[52] has observed that:

> "the realisation of a cause of action (especially a cause of action of some complexity) is … less obviously a matter for business common sense than the realisation of more conventional assets such as freehold or leasehold property, stock in trade or other tangible moveable property."[53]

In the same case, the Court of Appeal described decisions, based upon the strength or otherwise of a legal cause of action, made by an IP who was not a lawyer as "most unsatisfactory"[54].

The Court of Appeal also commented on the facts, that it was not "wholly immaterial" that the amount received for the assignment of the action coincided with the IP's estimate as to his likely fees and expenses. Although not making any imputation against the IP, the Court of Appeal did recognise that "his natural concern about his own position must have played some part in the decision-making process"[55]. The court does have jurisdiction to intervene in cases where IPs have reached decisions in good faith but where they had "not followed a satisfactory decision-making process and had not reached a satisfactory decision."[56] In deciding whether, and on what terms, to assign a cause of action (or engage a funder), an IP must take professional legal advice. Once the IP has received advice on the strengths and weaknesses of the claim, the IP must still exercise his or her independent judgement as whether to take any action and if the decision is to take action, the IP must then decide how best to realise the claim.

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[51] See the discussion in *LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch); [2019] 1 BCLC 38 at [55] as to whether an IP ought not to assign a claim where the action by the assignee might be one which the IP believed to be frivolous or vexatious.
[52] [2001] BPIR 246.
[53] *Faryab v Smith* per Robert Walker LJ at [32].
[54] *Faryab v Smith* per Robert Walker LJ at [38].
[55] *Faryab v Smith* per Robert Walker LJ at [39].
[56] *Faryab v Smith* per Robert Walker KJ at [45]

One obvious comparator when considering an assignment of an action to a commercial funder would be to investigate how much, if anything, the prospective defendant would be willing to pay for the cause of action.[57]

Whenever an IP is aware of the potential value of a cause of action, he or she must act to obtain a proper payment for any assignment of the action. If the value of the action is not clear, the IP ought to consider some process of inviting rival bids or to hold an auction of the cause of action. Money received will benefit either the creditors directly, if there is an eventual dividend paid, or indirectly, by enabling (at least part of) the expenses of the IP to be met.[58]

The position would appear to be similar where engagement with a funder does not lead to an assignment of the cause of action but instead allows for funding to be provided to the IP to enable the IP to pursue the action.[59]

One clearly significant difference between on the one hand funding being provided and on the other, an outright assignment of the action, is that in the latter, the IP loses control of the action. Depending upon the terms agreed with a funder, the action may be settled quickly by an assignee funder, in circumstances where an IP may have wished to continue the action with the aim of a greater return in the longer term. The loss of control, speed of resolution[60] and probability of success, are all matters, along with the actual financial figures agreed, an IP will need to take into account prior to agreeing terms with a funder.

Another potentially significant problem for a funder is the possibility that if its services fall within the terms of the Damages Based Agreements Regulations 2013, the court may find that the agreement with the IP does not comply with those Regulations and decide, on that basis that the whole agreement is also champtertous at common law.[61]

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[57] *Faryab v Smith* is an example of such an assignment being made albeit in the absence of appropriate legal advice. An IP needs also to satisfy the provisions of Statement of Insolvency Practice 13 if a cause of action is assigned to a person connected with the company or debtor. In such cases, the IP needs to demonstrate that he or she has acted with due regard to creditors' interests by providing creditors with a proportionate and sufficiently detailed justification of why a sale to a connected party was undertaken, including the alternatives considered.

[58] *LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch); [2019] 1 BCLC 38 at [67].

[59] IPs should be careful to avoid engaging the support of a funder which might breach the terms of the Damages Based Agreements Regulations 2013 (SI 2013/609) for which see *Meadowside Building, Developments Ltd (In Liquidation) v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC).

[60] On the issue of speed of resolution, an IP may need to consider whether or not a cause of action qualifies for hearing under the Insolvency Express Trials Practice Direction 9IET) (CPR PD 51P) came into force which sets the detail for a new pilot scheme known as Insolvency Express Trials (IET). The IET pilot scheme will now end on 6 April 2020. Its intention is to provide insolvency litigants with a speedy, streamlined procedure and an early date for trial or disposal where the application is simple.

[61] *Meadowside Building, Developments Ltd (In Liquidation) v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC) at [114].

5.4.5.1 Funders' liability

It is clearly important that the terms upon which a funding agreement is agreed considers what happens both where the action is successful and where it fails. If it fails, a "commercial funder" will need to understand the extent of its liability for adverse costs. It may self-insure these costs or purchase appropriate ATE insurance. The court may ask for evidence that a commercial funder has sufficient assets to cover any adverse costs. If such evidence is not forthcoming, the court is likely to order security for costs against the IP or the funder.[62] If the funding agreement is found to be champertous, the funder's liability for adverse costs will be unlimited.[63]

In general terms, the court wishes to ensure that funders are not dissuaded from funding actions but also that successful defendants have the ability to recover at least part of their costs where an impecunious claimant's action has failed. There are two factors or approaches to assessing a funder's liability for adverse costs that the court will take into account in ensuring its decision achieves a just result.

The court may limit a commercial funder's liability for adverse costs: 1) to the amount of the funder's contribution – the so-called *Arkin*[64] Cap; and 2) to the costs incurred by the winning party during the period when the funder had acted as such.[65] Funders should be aware that the *Arkin* Cap is not a rule but an approach which the court ought to consider in reaching a just result. The approach was determinative in the *Burnden* case but for a number of reasons was not followed in *Davey v Money*[66] (upheld on appeal[67]).The fact that each case will turn on its individual circumstances creates an uncertainty for funders in attempting to predict the likely sum of any security for costs which may be ordered.

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[62] *Re RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch); [2017] 1 WLR 4635 and *Re Hotel Portfolio II UK Ltd* [2020] EWHC 233 (Comm).

[63] *Arkin v Borchard Lines Ltd (Nos 2 & 3)* [2005] 1 WLR 3055 at [40].

[64] Named after the case *Arkin v Borchard Lines Ltd (Nos 2 & 3)* [2005] 1 WLR 3055.

[65] *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch) at [8] – [11].

[66] *Davey v Money* [2019] EWHC 997 (Ch); [2019] 1 W.L.R. 6108 at [48] – [111] and summarised in *Burden* at [16] in the following terms: "i) The funder had approached its involvement throughout as a commercial investment. ii) The litigation was sufficiently out of the norm to warrant the making of an indemnity costs award against the claimant. While the funder had not itself directed the way the case was conducted, it had sufficient opportunity to investigate and form a view as to the nature of the claim and the support for the allegations being made before choosing to fund it. iii) The funder must have known that the claimant was most unlikely to be able to pay any substantial costs awarded against her. iv) The funder had halved its commitment to funding but retained the same potential share of recoveries, which highlighted the commercial self-interest motivating it. v) The funder had negotiated to receive a substantial commercial profit which would have taken priority over any compensation payable to the claimant.

[67] *Chapelgate Credit Opportunity Master Fund Limited v Money* [2020] EWCA Civ 246.

5.4.5.2 Security for Costs

As is well understood, insolvency litigation has a number of characteristics which may distinguish it from other civil litigation. If an IP decides to take legal action, the defendant will often ask the court to order security for the defendant's costs against the insolvent estate represented by the IP. It is, of course, possible that an insolvent company will have sufficient assets available to cover that security[68] but in many cases the company will be impecunious or at least unable to meet an order for adverse costs. Under CPR 25.12 and 25.13, the court may order security for costs if there is reason to believe the company will be unable to pay the defendant's costs if ordered to do so.[69]

In such cases, the IP may argue that any order for security of costs will unfairly stifle the claim. In order to convince the court that the action would be stifled, the IP must put evidence before the court as to the company's means and must satisfy the court, to a standard of probability, that an order for security of costs would stifle the action. The court will assess the claimant's ability to provide security by looking at the company's assets but will also likely consider whether such security might be expected from third parties such as creditors, shareholders, associated companies, ATE insurers or third party funders. The burden is on the IP to provide evidence as to whether such security is likely or unlikely to be available from such sources.[70] Although the support of an ATE insurer or funder is often deemed essential by an IP in such cases, it should be borne in mind that the court will not order security for costs if there are good reasons why there is no-one in the background who can provide such security.[71] Equally, unless the court is convinced that ATE insurance or the capital value of the funder in question is a reliable source to cover any adverse costs, an order for security for costs will still be made.[72]

There is therefore much to be said for an IP conducting due diligence into how its proposed funder operates. If there is a lack of transparency about the funder's capital value it will not be capable of "self-insuring" and will usually need to take out ATE insurance to cover possible adverse costs. The ATE premium will add a cost to the action, and unless its terms have been negotiated carefully, may not survive an application for security for costs.

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[68] Adverse costs will normally be paid as an expense in the administration or liquidation – see rules 3.51 and 7.108 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024).

[69] An order for security for costs is to be seen as a weapon to be used by a defendant to obtain swift summary judgment. It is intended to provide the claimant with options, that is, a choice as to whether to provide the security ordered or to discontinue the claim (*Prince Radu of Hohenzollern v Houston* [2006] EWCA Civ 1575 at [18]).

[70] *Burnden Holdings UK Ltd v Fielding* [2017] EWHC 2118 (Ch) at [87- 92] citing amongst other authorities, *Brimko Holdings v Eastman Kodak Company* [2004] EWHC 1343 (Ch) at [11].

[71] For an example where the court refused to order security of costs in the sum of £500,000 against a company in liquidation, as such an order would stifle the claim, see *Absolute Living Developments Limited (In Liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch).

[72] *Re Hotel Portfolio II UK Ltd* [2020] EWHC 233 (Comm).

5.4.6 Damages Based Agreement ("DBA")

A DBA allows for a fully contingent fee in that lawyers (or others providing services to IPs) may agree to receive a percentage of any damages awarded (subject to a cap of 50% of damages paid)[73]. There are concerns from lawyers that the very prescriptive requirements for DBAs, with the consequence of non-compliance being that they are unenforceable, have put many off using DBAs. There is also perceived by some lawyers to be an insuperable conflict of interest facing lawyers who agree to such agreements. If a lawyer wishes to benefit from a percentage of any proceeds of an action, there is the concern that the IP would not be acting in the best interests of the creditors by agreeing to such an agreement rather than a more conventional CFA.

There is some interest in the possibility of a future hybrid form of DBA, whereby in any event, lawyers would be able to recover a maximum of 30% of their costs. This may prove attractive to IPs and their lawyers in future if such a partial or hybrid DBA becomes legally possible. A recent independent review[74] of DBAs may still breathe life into the DBA concept.

Whatever the reasons for the widespread reluctance to adopt DBAs, there is little evidence that they are used in insolvency practice. In the small number of cases where they have been used successfully, there remains anecdotal evidence that they may not have been fully compliant with legislative provisions, and so, may have been found to be unenforceable if the point had been pursued. It may be that DBAs become more popular in the future but legislative change would appear to be necessary for them to be taken up in significant numbers in the insolvency context.

[73] See in general section 58AA of the Courts and Legal Services Act 1990 and the Damages Based Agreements Regulations 2013 (SI 2013/609).

[74] *The DBA Reform Project 2019* was carried out at the request of the Ministry of Justice by Nicholas Bacon QC and Professor Rachael Mulheron of Queen Mary University London. The project report and related documentation may be found at: https://www.qmul.ac.uk/law/research/impact/dbarp/.

5.5 What Should an IP do?

It is clear that the decision facing an IP as to how to realise the value of a cause of action is often "nuanced and difficult"[75]. It would seem from the above discussion that IPs need to have in mind the following fundamental propositions when contemplating litigation:

(a) The fiduciary nature of their duties.

(b) They must therefore act in what they believe to be the best interests of the creditors.

(c) They must keep proper records of their decision-making processes so as to be able to account for expenditure made.[76]

(d) They must ensure that both their time costs and any costs such as legal costs are best value for money.

(e) They are expected to exercise proper commercial judgment when realising any asset but when realising a cause of action they will need to take legal advice.

(f) The whole range of funding options must be considered and a judgement must be made as to which is in the best interests of the creditors, not merely which is most likely to ensure the payment of the IPs' fees.

(g) It may be necessary to approach a number of funders or assignees in order to ensure the IP can be seen to be taking reasonable care to act in the best interests of creditors.

(h) IPs must recognise the risks inherent in different funding options.

In the next section, the views of IPs who responded to an online survey will be considered, data kindly made available by Manolete Partners plc will also be analysed, along with the opinions of a number of other stakeholders who were interviewed in order to assess, amongst other things, whether IPs are following these guidelines. A summary of the main findings will be made. Where there are areas which might benefit from improvement, the final section will consider changes which might be considered by the Government or the profession.

[75] *Absolute Living Developments Limited (In Liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch) at [33].

[76] The provisions of Statement of Insolvency Practice 2 must be satisfied in this regard.

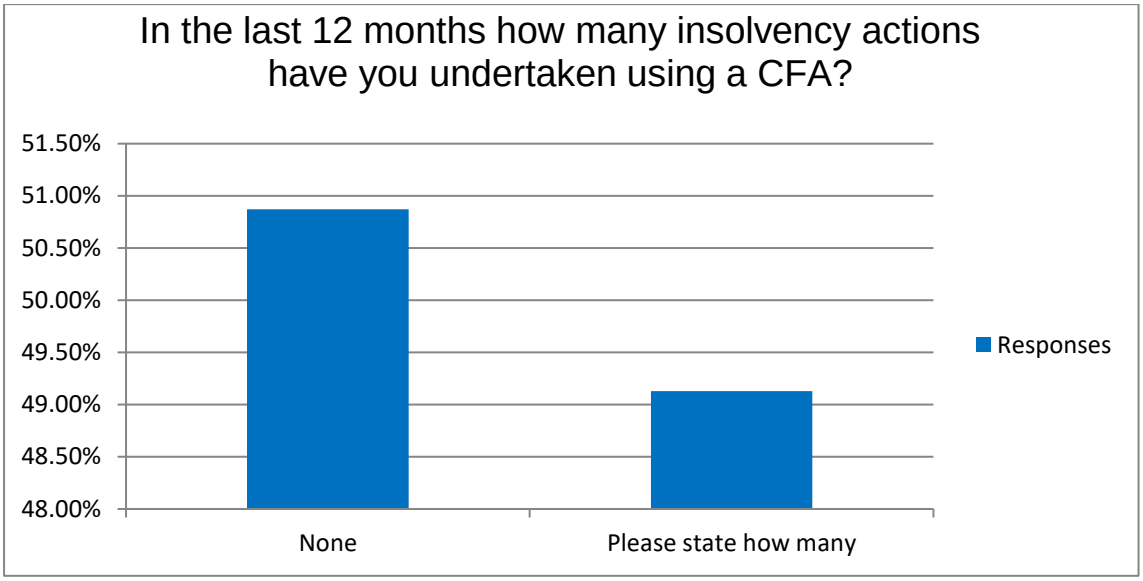
6 Empirical Evidence

An online survey was open from September 2019 to February 2020. Another source of empirical data was kindly provided by Manolete Partners plc who kindly made available data on the cases which were put forward for its consideration during 2019 as well as details of all of its historic cases. In order to give context and some detailed commentary on current practice a number of interviews were conducted with practitioners and other stakeholders between October 2019 and February 2020. These different sources of data are considered below.

6.1 Survey Data

In the following discussion, each question contained within the online survey is presented along with an explanation and analysis of the answers provided.

Question 1



None	50.87%	88
Please state how many	49.13%	85
	Answered	**173**

The survey was addressed to IPs but a small number of other stakeholders, mostly lawyers, also answered the questions. There was a final total of 173 respondents. Approximately 150 of these respondents were IPs or were otherwise responding on behalf of IPs.

Although there are currently 1,553 licensed IPs,[77] anecdotal evidence suggests that not all of these IPs actually take appointments (or take appointments which commonly involve insolvency litigation). In the two previous research reports in 2014 and 2016, calculations were based upon an estimate that there were approximately 450 such active appointment takers. For the purposes of this report, and to enable comparisons to be drawn with the data from the previous reports, it is assumed that there are still approximately 450 active appointment taking IPs. It is appreciated that the figures

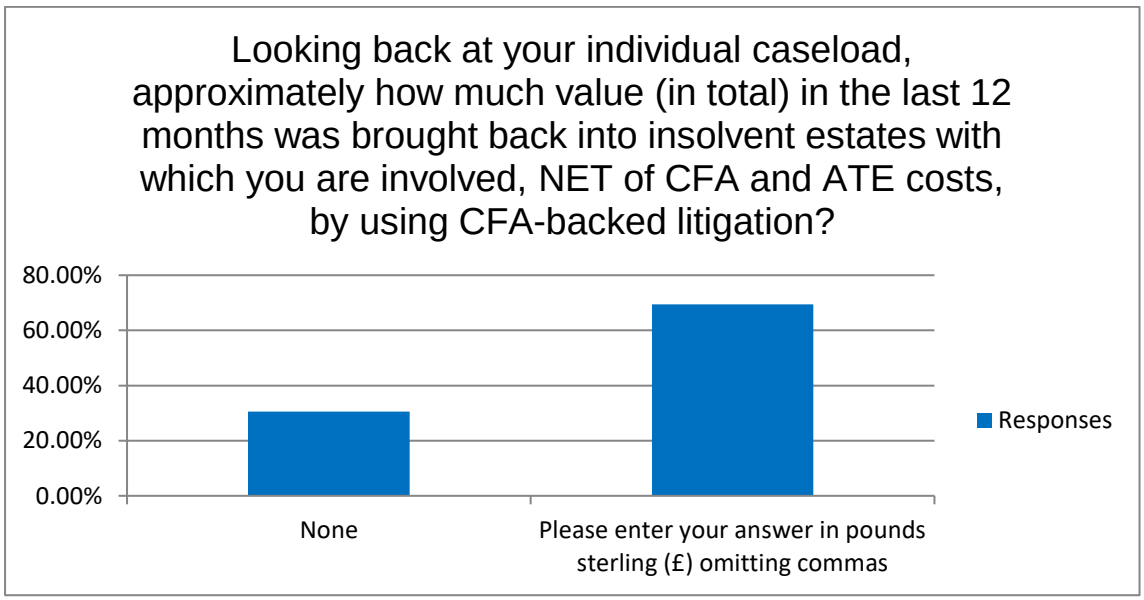
[77] My thanks to Bob Pinder of the ICAEW who kindly provided this figure. Of the 1,553 IPs licensed as at 1st January 2020, 1,236 are appointment-taking. The figure of 1,236 is made up of 610 IPs licensed by the ICAEW, 514 by the IPA, 72 by the ICAS and 40 by CAI.

produced may therefore be very conservative when assessing the size of the insolvency litigation market.

If one accepts that there are likely to be 450 current appointment taking IPs, the response rate to the survey of approximately 40% of that number is very encouraging. I would like to express my gratitude for the support the survey received from the ICAEW, the IPA and particularly Manolete Partners plc who pledged £5,000 to Great Ormond Street Children's Hospital dependent upon a healthy survey response rate from the profession. My thanks to all concerned.

Of the 85 respondents who answered that they had used a CFA in the past 12 months, the total number of actions specified was 656. This leads to an average of 7.72 actions per IP using a CFA in the previous year.

Question 2



Answer Choices	Responses	
None	30.51%	19
Please enter your answer in pounds sterling (£) omitting commas	69.49%	40
	Answered	**59**
	Skipped	**114**

Although 85 respondents had answered Question 1 that they had used a CFA in the previous 12 months, only 59 answered Question 2 which asked for details about those actions.

Of the 59 who answered, 19 who had identified a total of 61 actions using a CFA answered that there had been no net contribution made to the insolvent estates involved, once fees and costs had been paid.

The 40 respondents who had experienced a net gain by the use of CFAs accounted for a total number of 298 actions which had contributed a net total figure of £43,681,557.

The average net return per claim is therefore £121,675.65 per action.

It is likely that the costs and fees which were paid before the net return to the estate, were for a similar figure. In other words, the total sum recovered by the action was likely to be double the net return figure. It is therefore reasonable to assume that the average case recovered from the defendant in total approximately £250,000.

If one factors in the 26 respondents who had used a CFA in the previous 12 months but did not provide details of their net recoveries, those 26 represent a further 297 actions. If one extrapolates those actions at the average rate per claim above (£121,675.65), one gets a further likely total of net recoveries of £36,137,668.

This leads to a likely total £79,819,225 of net value brought into insolvent estates by the 85 respondents who had used a CFA in the previous 12 months. If this figure is recognised as representing 40% of the IP appointment taking profession, the figure suggests a total net figure of approximately £200m being brought into insolvent estates by the use of CFAs.

Although each case turns upon its own facts, as mentioned above, it is widely believed that on average approximately half of any actual recoveries using CFA-based litigation, finds its way back to the estate net of costs. The above calculation would therefore suggest a total annual recovery of £400m by use of CFAs in insolvency litigation.

Again, it is also widely recognised that the amount recovered from defendants averages out at approximately 50% of the initial amount claimed in the action. A further extrapolation might therefore be made that claims initially valued at approximately £800m are actioned per annum in insolvency litigation using CFAs.[78]

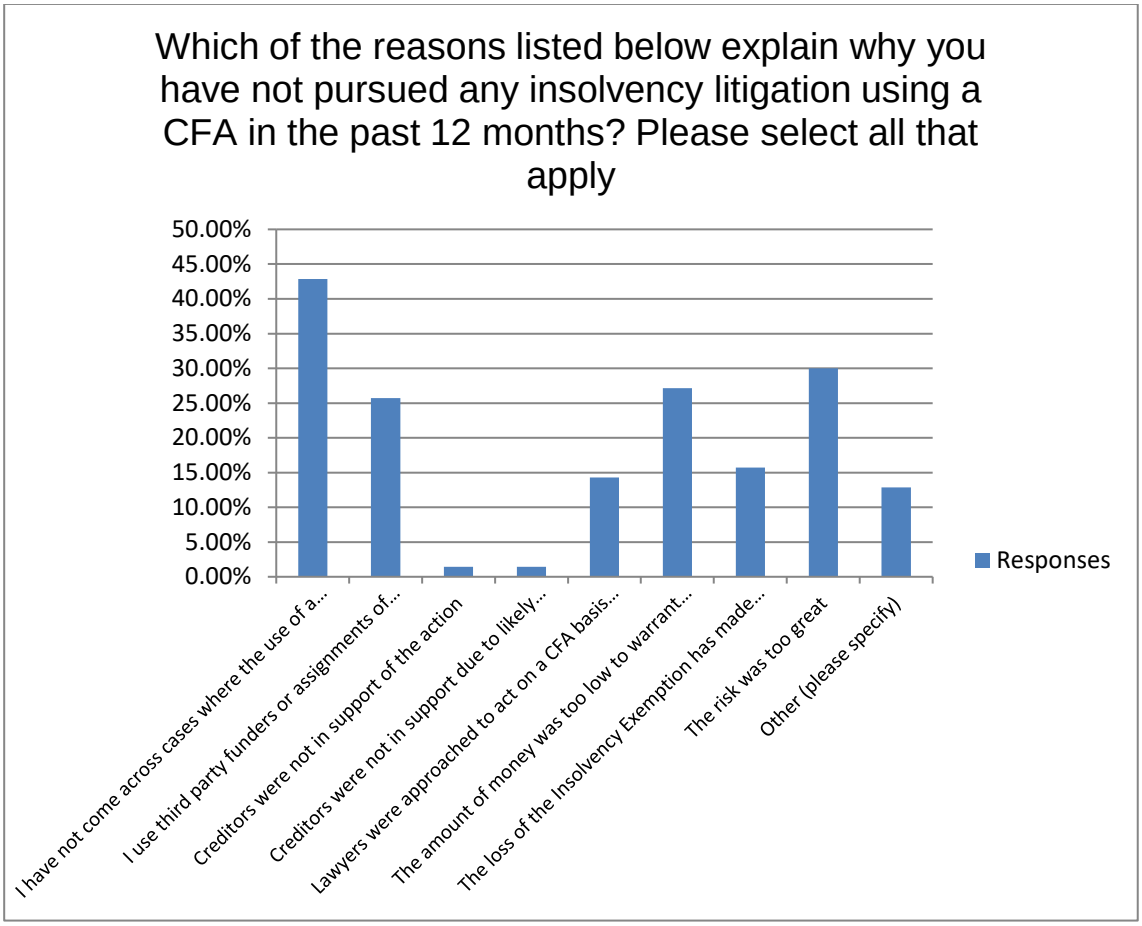
Although this method of straight line extrapolation is arguably open to criticism, it is effectively the same method as used in both the 2014 and 2016 reports. In 2016, it was estimated that, prior to the Jackson Reforms, claims worth approximately £1bn were pursued using CFAs.[79] When comparing the figure of £1bn from 2016 with the reduced £800m from 2019, it is suggested that the value of insolvency claims being pursued using CFAs has decreased following the Jackson Reforms by approximately 20%.

This result is not entirely consistent with the opinions expressed in 2015, that approximately half of IPs intended to take action in fewer cases due to the Jackson Reforms[80] but it perhaps sits more comfortably with the answers to Question 12 below

[78]If one extrapolates based upon the total number of appointment-taking IPs, 1,236, the total figure is likely to be 2.5 times this figure, approximately £2bn.
[79] See Section 2.2 of the 2016 Update.
[80] See Appendix B of the 2016 Update.

where only 16% of respondents stated that they have stopped or decreased the amount of litigation work following the Jackson Reforms.

Question 3



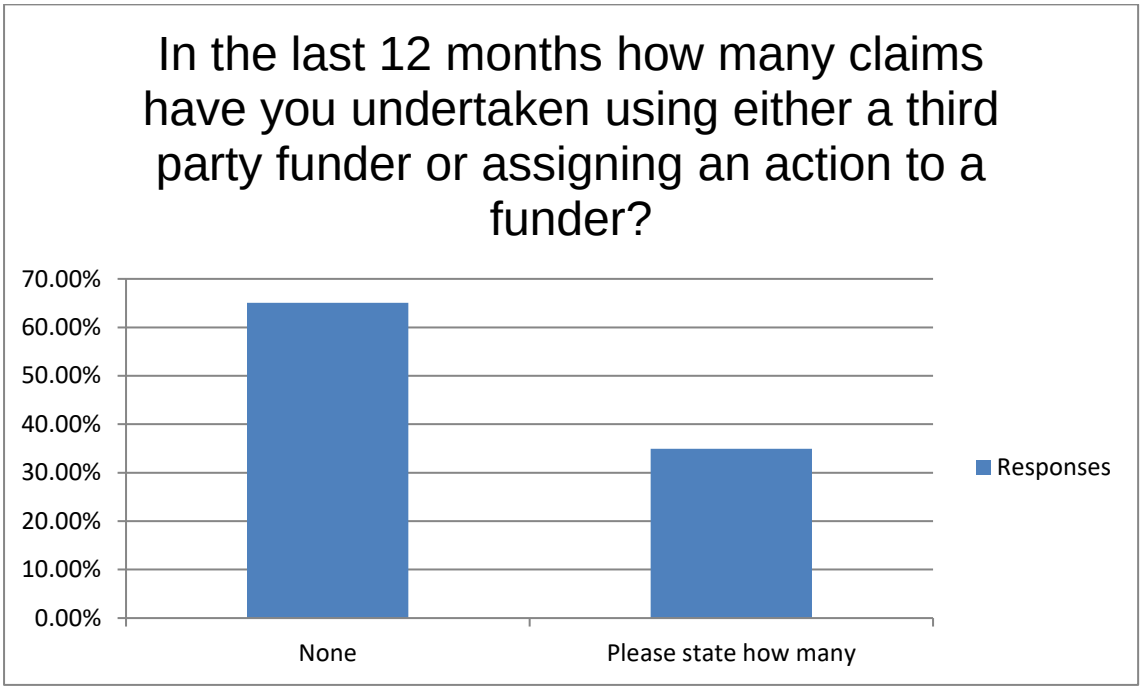
Answer Choices	Responses	
I have not come across cases where the use of a CFA would be appropriate	42.86%	30
I use third party funders or assignments of actions instead	25.71%	18
Creditors were not in support of the action	1.43%	1
Creditors were not in support due to likely reduced return	1.43%	1
Lawyers were approached to act on a CFA basis but had declined to act	14.29%	10
The amount of money was too low to warrant action	27.14%	19
The loss of the Insolvency Exemption has made the use of a CFA unattractive	15.71%	11
The risk was too great	30.00%	21
Other (please specify)	12.86%	9
	Answered	**70**
	Skipped	**103**

Of the 88 respondents who had not used a CFA in the previous 12 months, 70 provided reasons. Although a large minority had not come across appropriate cases, it is interesting to note that a quarter of those who answered explained that they now used funders or assignments instead of CFAs. This suggests that a proportion of the profession has decided that using third party funders or assignees is their default position for certain types of claim which would previously (before the Jackson Reforms) have been actioned using a CFA.

It is also interesting to note that over a quarter regarded the amount of money as too low to warrant action. This would have been less of a concern prior to the Jackson Reforms and is suggestive that those Reforms have had a significant impact on IPs' ability to bring relatively small claims.

It is possible that these two groups of responses are related in that it may be that relatively small value claims are no longer viewed as realistic for IPs to pursue themselves but that they may still be attractive to funders or assignees.

Question 4



In the last 12 months how many claims have you undertaken using either a third party funder or assigning an action to a funder?		
Answer Choices	Responses	
None	65.04%	80
Please state how many	34.96%	43
	Answered	**123**
	Skipped	**50**

Only 43 of respondents had used a third party funder or assignee in the previous 12 months. This is almost half of the number of IPs who had used a CFA. Of those who had used a funder or assignee, 26 had also used CFAs (in significant numbers – in total those 26 had taken 177 CFA-backed actions bringing in a net figure of £38,160,000). This suggests a reasonable number of IPs are considering their options and using either a CFA or funders depending upon the facts of each case.

The total number of actions taken by the 43 respondents who answered this question positively was 206 with an average of 4.8 actions per IP. Interestingly, less than a handful of respondents accounted for just over half of the actions taken in this way. Nearly half of the 43 (19) had used funding or assignment in only a single case.

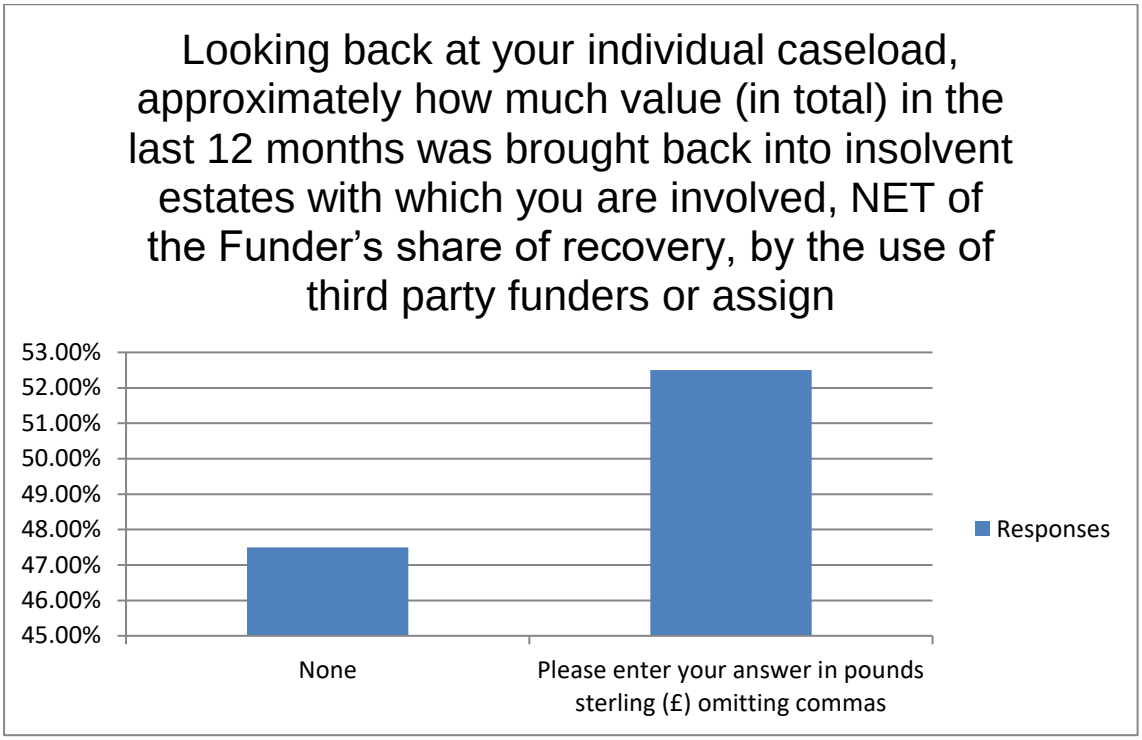
There are some IPs whose practice is very litigious in nature and they appear to be using the full array of funding options available to them. Some IPs are beginning to use funders whilst others have yet to do so (or at least did not do so in the previous 12 months).

Question 5 Which third party funders or assignees have you used in the last 12 months?

Only 40 respondents answered this question. Those mentioned included Manolete (27 times), Harbour (2), Henderson and Jones (2) and the following were all mentioned once: AB Insolvency, Acasta, Amtrust, Apex, Augusta, Benchwalk, Burford, Cavendish, CCH, Escalate, IMF, LCM, Therium, Vannin, shareholder, secured creditor.

A number of respondents did not wish to disclose which funders they had used and some intimated that there were some IP firms and solicitors' firms operating as third party funders.

Question 6



Answer Choices	Responses		
None	47.50%	19	
Please enter your answer in pounds sterling (£) omitting commas	52.50%	21	
	Answered	**40**	
	Skipped	**133**	

The 21 IPs who answered this question had taken action in 148 cases bringing in a net figure of £72,767,500 at an average of £491,672.30 per action. As explained above, most IPs who used funders also used CFAs to some extent. For most IPs it therefore appears that it is not a question of either CFAs or funders but of choosing the most appropriate mechanism for a particular case.

The answers to this question, when compared to the answers to Question 2 above, suggest that funders tend to be used in bigger value cases. Smaller cases are more likely to continue to use (often informal) CFAs with or without ATE cover.

The total net figure of nearly £73m is notable. It is not far behind the likely figure of approximately £80m for CFA-backed litigation considered above at Question 2. It suggests that the use of funding is fast catching up the use of CFAs.

If one uses the same method of extrapolation as used at Question 2, with the net figure being regarded as representing 40% of the total appointment taking IPs, a total net recovery of £180m for the year is likely. If this is accepted as being approximately half

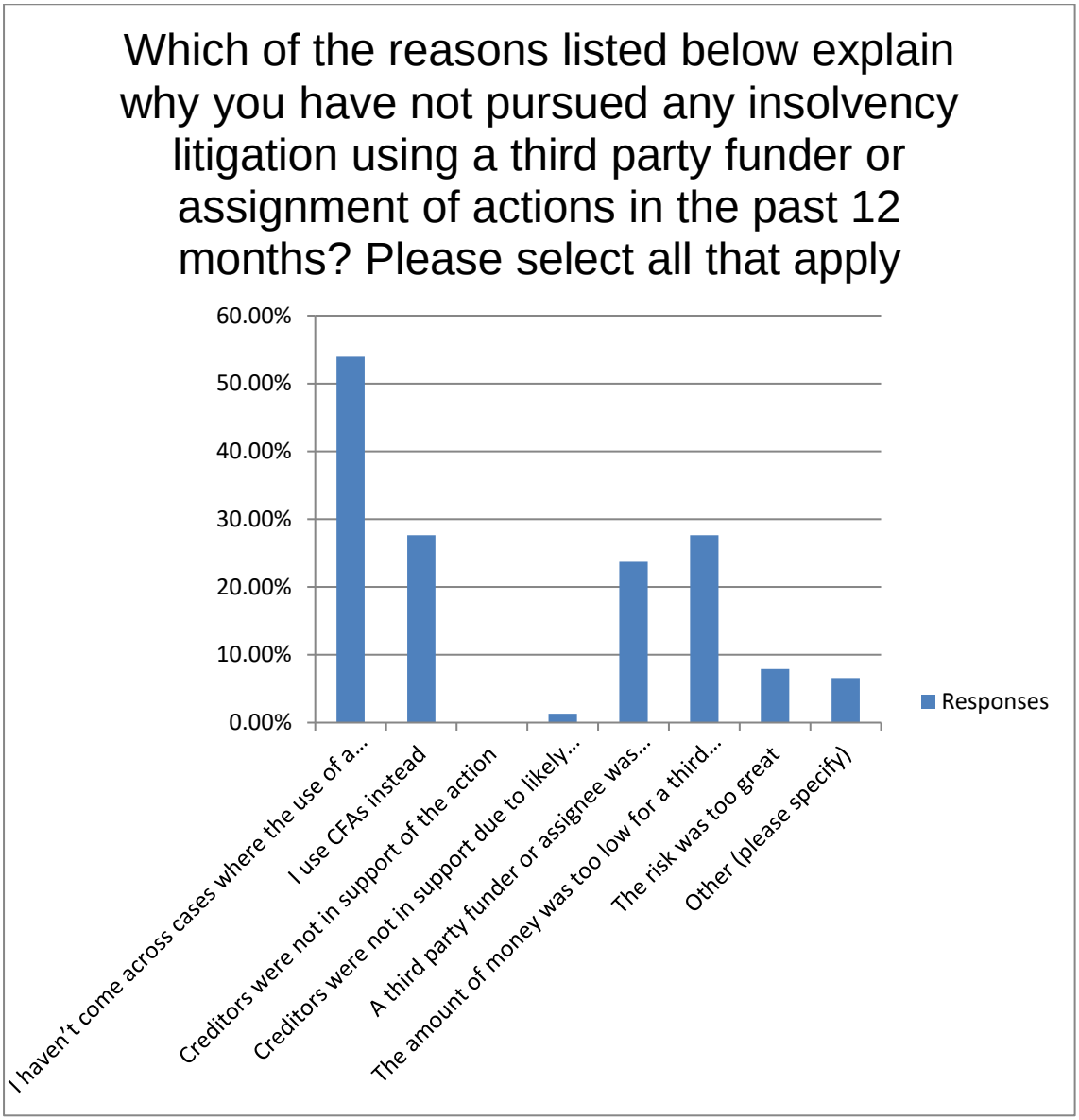
of the amount actually recovered by the actions, prior to the payment of fees and costs, the total recovered from such action would be £360m. Again, using the same method as for Question 2, this might be seen as realising claims initially valued at £720m.[81]

A note of caution must be sounded at this stage. Although the survey was completed by a significant number of IPs, it is entirely possible that predominantly only those IPs who have an interest in the use of funders found the time to complete the survey. It is possible that the extrapolation made therefore overstates the extent to which funding is being used.

Taken at face value, the figures do suggest that the profession has increased significantly the use of funding and assignments from 2015 (before the Jackson Reforms) where total claims being pursued by funding or assignments was likely to be in the region of £50m.[82] The market has clearly expanded significantly.

[81] If one extrapolates based upon the total number of appointment-taking IPs, 1,236, the total figure is likely to be nearer £1.8bn.
[82] See the 2016 Update at 2.2D.

Question 7



Which of the reasons listed below explain why you have not pursued any insolvency litigation using a third party funder or assignment of actions in the past 12 months? Please select all that apply		
Answer Choices	Responses	
I haven't come across cases where the use of a third party funder or assignment of action would be appropriate	53.95%	41
I use CFAs instead	27.63%	21
Creditors were not in support of the action	0.00%	0
Creditors were not in support due to likely reduced return	1.32%	1
A third party funder or assignee was approached but had declined to act	23.68%	18

The amount of money was too low for a third party funder or assignee to be interested	27.63%	21
The risk was too great	7.89%	6
Other (please specify)	6.58%	5
	Answered	**76**
	Skipped	**97**

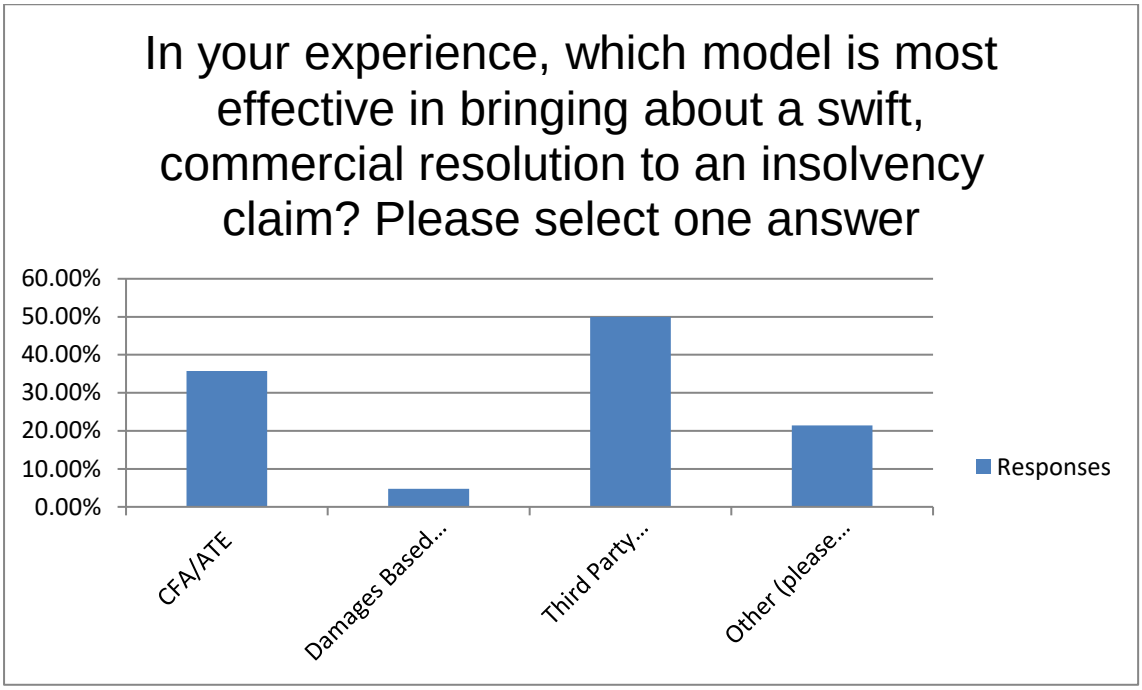
Over half of the respondents gave as the main reason why they had not used third party funders or assignments the fact that they had not come across any suitable case. Interestingly, over a quarter stated that they used CFAs instead, which suggests for some IPs, that the issue of how to fund an action is a binary decision and the only answer is to use a CFA. It may be that such IPs use CFAs only because the type of case they encounter is always more sensibly pursued using a CFA perhaps due to its being for a relatively small amount. The same proportion of respondents who stated they used CFAs also believed the amount of money involved in their case load was too low for a funder to be interested. About a quarter of respondents chose the two (possibly related answers) that the amount of money was too low to interest a funder or that a funder had been approached but had declined to take up the case.

Question 8 Do you believe any particular funding method is best suited to compliance with the duties owed by an office-holder?

A total of 77 respondents answered this question with 29 providing further narrative answers which were capable of categorisation. Of the 29, 12 were in favour of using funders or assignment of actions, 8 favoured the use of CFAs (either with or without ATE insurance), 2 would like to see a version of the Australian system adopted in the UK, 2 favoured creditors providing support and 5 stated that it always depends upon the facts of the individual case.

Other comments included votes of confidence in the business model of two funders in particular. One respondent commented that all forms of funding were seen as leading to some loss of control. One respondent felt that funding was only used where the claim was for over £20m. One respondent claimed that not all IPs consider all the options available to them with the consequence that they might not be able to show they are taking steps to ensure the best return to creditors is made.

Question 9



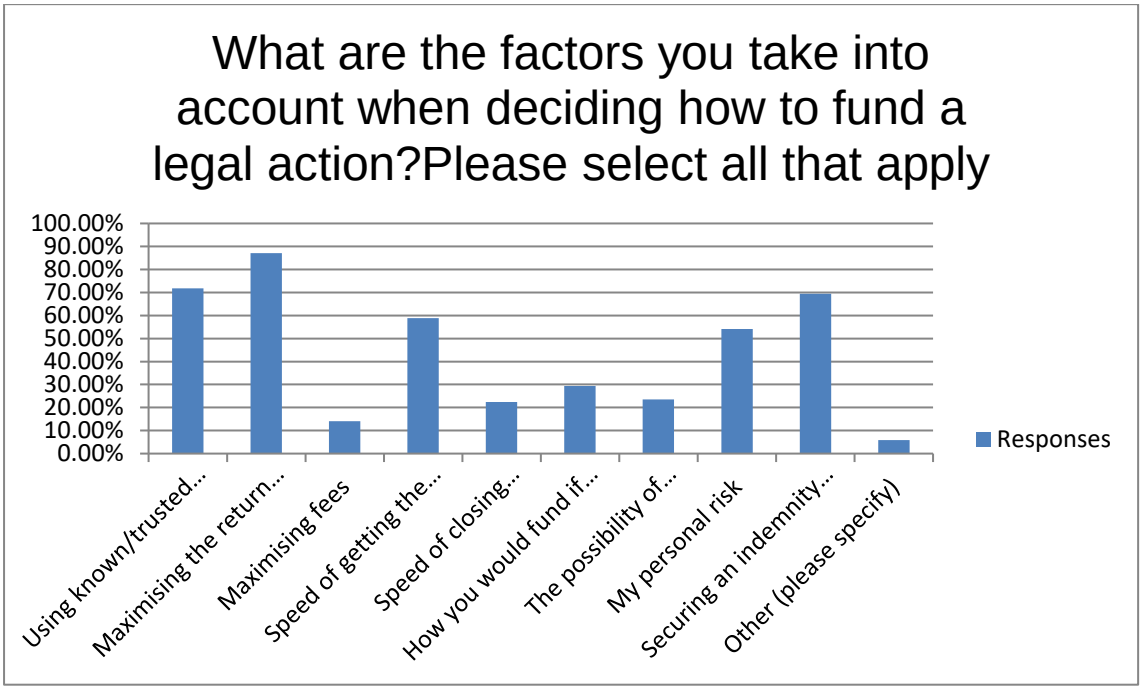
In your experience, which model is most effective in bringing about a swift, commercial resolution to an insolvency claim? Please select one answer		
Answer Choices	Responses	
CFA/ATE	35.71%	30
Damages Based Agreement	4.76%	4
Third Party Funding/Assignment	50.00%	42
Other (please specify)	21.43%	18
	Answered	**84**
	Skipped	**89**

The answers to this question suggest that half of respondents see the use of funders as most likely to lead to a swift commercial resolution to an insolvency claim although over a third favours the use of CFAs and ATE. There was no real pattern to the other answers provided. No details were provided by those who favoured the use of DBAs (two of the respondents who chose DBAs were solicitors not IPs). The answers do suggest that the abolition of recoverability by the Jackson Reforms has reduced the impact upon defendants of using CFAs and ATE. It would appear that a larger number of IPs now see the pressure brought by the use of a funder is more likely to encourage early settlement by a defendant.

Question 10 Before starting a legal action do you consider all the ways in which it might be funded before instructing solicitors?

Of the 80 respondents who answered this question, nearly all said yes but a very small minority stated no. Some expanded upon their answer in the negative by explaining they did not consider funding options until they had initial advice or followed legal advice on funding. Overwhelmingly, IPs said they did consider all possible funding options although one said his or her belief was that many IPs did not do so.

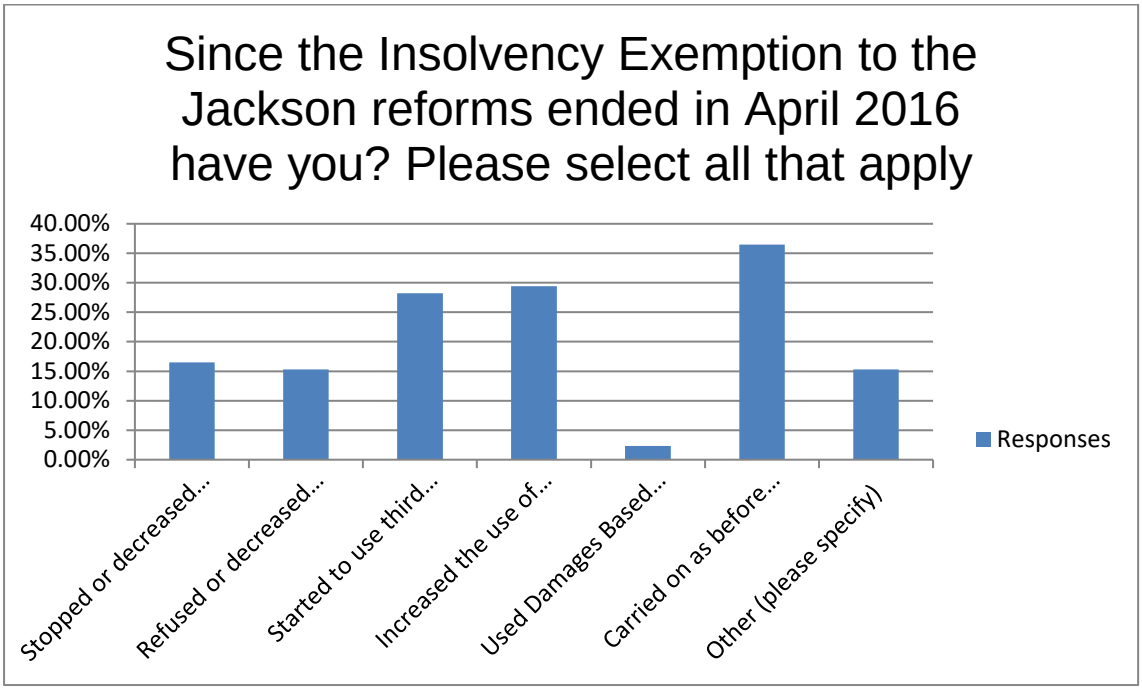
Question 11



What are the factors you take into account when deciding how to fund a legal action? Please select all that apply		
Answer Choices	Responses	
Using known/trusted lawyers	71.76%	61
Maximising the return to creditors	87.06%	74
Maximising fees	14.12%	12
Speed of getting the case to trial or settlement	58.82%	50
Speed of closing insolvency procedure	22.35%	19
How you would fund if you were paying out of your own pocket	29.41%	25
The possibility of funding giving rise to a conflict of interest	23.53%	20
My personal risk	54.12%	46
Securing an indemnity against adverse costs	69.41%	59
Other (please specify)	5.88%	5
	Answered	**85**
	Skipped	**88**

It is perhaps reassuring that the most popular answer to this question was "Maximising the return to creditors". The next two most popular answers were using trusted lawyers and securing an indemnity for adverse costs. The adverse costs concern is certainly extremely understandable and again it is reassuring that legal advice from trusted lawyers is such a popular answer. It suggests that lawyers' advice is being sought and followed in such cases. This is consistent with the fiduciary duty of an IP discussed above in Part 5. Speed of getting to trial or settlement was the next popular answer followed by an IP recognising the fiduciary duty to consider expending funds in the same manner as if they were the funds of the IP. Maximising fees was a minority answer but still relatively popular. The "other" category contained comments about the difficulty of finding funding from creditors such as HMRC.

Question 12



Since the Insolvency Exemption to the Jackson reforms ended in April 2016 have you? Please select all that apply		
Answer Choices	Responses	
Stopped or decreased the amount of litigation work carried out	16.47%	14
Refused or decreased the number of cases taken on where there are few or no assets available to fund litigation	15.29%	13
Started to use third party funders	28.24%	24
Increased the use of third party funders	29.41%	25
Used Damages Based Agreements to fund litigation	2.35%	2
Carried on as before using CFAs	36.47%	31
Other (please specify)	15.29%	13
	Answered	**85**
	Skipped	**88**

The answers to this question show that, due to the Jackson Reforms, a significant number of IPs have started to use funders (28%) or increased their use of funders (29%) although over a third have continued as before using CFAs and ATE. In the 2015 survey which supported the 2016 Update report, a slightly lesser proportion (22.4%) of IP respondents to a survey, stated that, post Jackson, they intended to carry on using CFAs as before.[83]

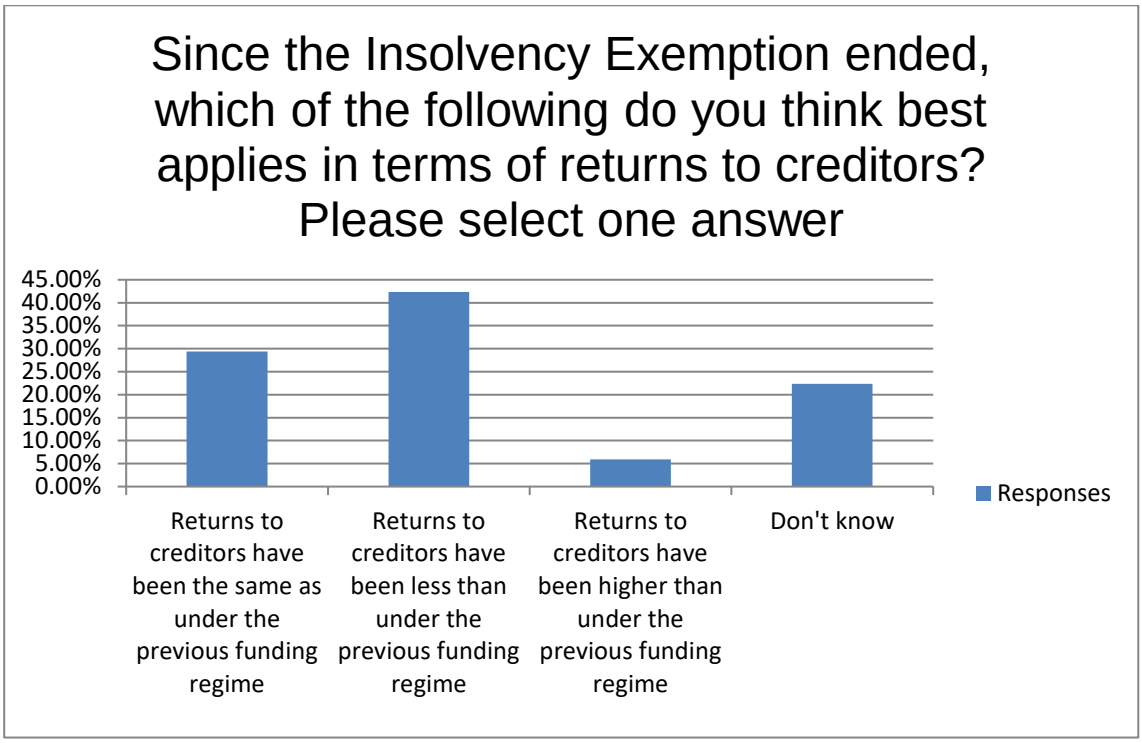
A reasonable number have changed their practice by refusing or decreasing the number of appointments where there are no assets (15%). In the 2015 survey, 63% of IP respondents had expressed the view that they would, post Jackson, reduce the number of appointments where there were few or no assets.

Just over 16% of respondents stated that the Jackson Reforms had led them to stop or decrease the amount of litigation they previously took. It is interesting to compare this figure with the survey in 2015, where 49% of IP respondents believed that the Jackson reforms would lead to them stopping or reducing the amount of insolvency litigation they carried out.

It is reasonably clear that although the Jackson Reforms have had an effect on the decisions of some IPs to take appointments over impecunious estates or to pursue legal action, the impact has not been as great as was feared. The insolvency profession has shown itself to be adaptable to new conditions.

[83] See Appendix B of the 2016 Update.

Question 13



Since the Insolvency Exemption ended, which of the following do you think best applies in terms of returns to creditors? Please select one answer		
Answer Choices	Responses	
Returns to creditors have been the same as under the previous funding regime	29.41%	25
Returns to creditors have been less than under the previous funding regime	42.35%	36
Returns to creditors have been higher than under the previous funding regime	5.88%	5
Don't know	22.35%	19
	Answered	**85**
	Skipped	**88**

It is interesting that virtually all the respondents who had an opinion viewed the effect of the Jackson Reforms as having either no effect on creditor returns (29%) or reducing the returns to creditors (42%). Despite a small number of views to the contrary, the majority of those with an opinion recognise that the Jackson Reforms have reduced returns to creditors. The fact that nearly a quarter had no view and nearly a third thought returns had remained the same, suggest that for a sizeable proportion of the

profession, the effects of the Jackson Reforms have not been as serious as was feared in 2016.[84]

Question 14 In the last 12 months how many claims have you undertaken using a Damages Based Agreement?

There were only two respondents who stated they had pursued litigation by use of a DBA. There was no detail given as to whether or not their use had been successful.

Question 15 Do you have any other comments in relation to all forms of funding for insolvency litigation?

Although 64 respondents answered this question, many responses were "no". The following is a general summary of the main points made by respondents.

Of the substantive answers a number of points were made by individuals. Two individuals favoured the introduction of an Australian system to allow creditors who did finance insolvency litigation to gain an enhanced return in the event the litigation was a success. One of the respondents believed that such a legislative provision would be a useful addition to the IP's toolkit and would complement rather than compete with the useful role played by litigation funders. The other respondent who favoured the Australian system was of the view that once the Crown's status as a preferential creditor was re-introduced, other creditors would be completely disincentivised to support litigation as any proceeds would normally be taken by the Crown. The Australian system would ensure such creditors remained engaged.

A number of respondents emphasised the need to consider all funding options. There was a divergence of views in terms of which funding option provided better returns to creditors. Some suggested that litigation funding was more effective whilst others believed that using a CFA (with or without ATE insurance) generally led to better creditor returns.

Some of the respondents found finding a funder to be a longwinded and time consuming process especially where the outcome was uncertain. Some IPs felt that funders only wanted to take on "dead certs".

A number of respondents found the costs of ATE insurance to be prohibitive which made a package from a third party funder which effectively indemnifies office-holders against adverse costs to be very attractive. A number of respondents did not feel that ATE insurance always covered risks borne by an IP.

[84] See in particular the answer to Question 20 of the survey carried out as part of the 2016 Update (found in Appendix B) where over 86% of respondents felt that post Jackson, use of third party funders would reduce returns to creditors.

There was a belief that funders could provide a more flexible approach. A tiered recovery for the funder could be more fully explored and might generate higher use. An example of this approach was provided in the following terms: there is little risk to anyone prior to issuing proceedings so any recovery by the funder could be made subject to a *de minimis* recovery. Any correspondence to the prospective defendant could still refer to funding being in place to encourage a settlement but without a disproportionate payment to the funder. This type of approach might lead to a greater take-up if this type of arrangement was marketed.

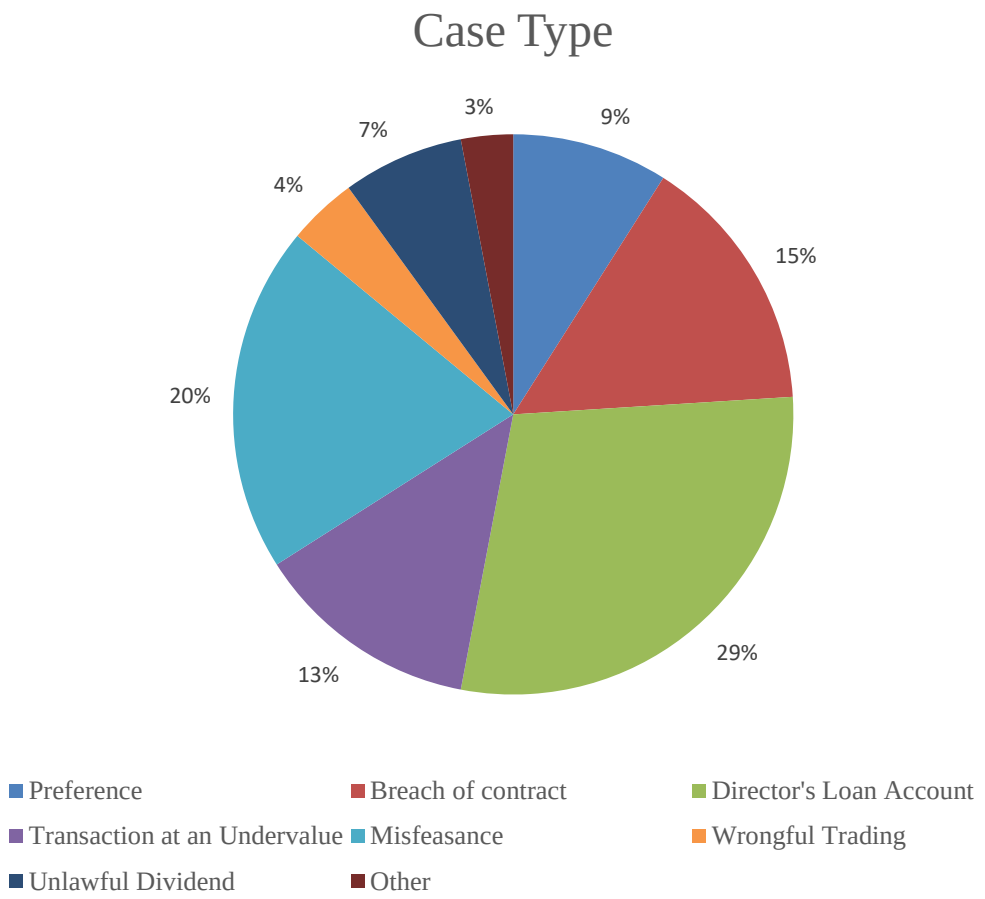
There was a general feeling that the funding market was still developing and that further options might appear as competition became keener.

Certain named funders were mentioned in positive terms. The financing or assignment options offered were seen as a "god-send" as they greatly reduced an IP's own time cost accumulation on a case.

Others believed that funding was still too expensive and not commercially viable except in high value cases. One respondent was of the view that it was not possible to bring a claim for less than £2m and provide a commercial return to creditors.

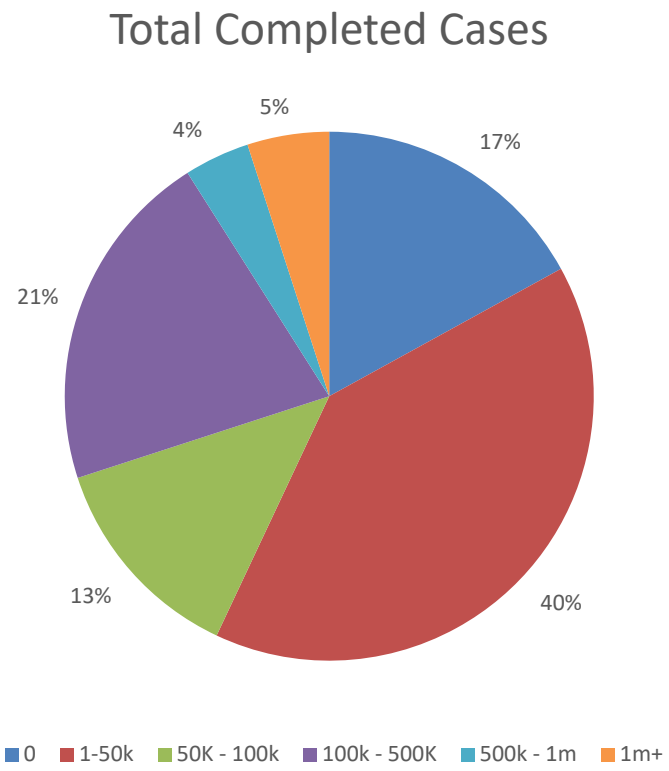
6.2 Manolete Partners plc Data

I am very grateful to Manolete Partners plc ("Manolete") for providing me with access to its entire case load and to details of actions which, for various different reasons, they decided not to fund. Historically Manolete accepted around 22% of cases offered to it, but in the previous 12 months that had increased to 30%. This change is consistent with the view that in the past, funders were seen as a "last resort" and therefore tended only to be shown the "orphan" cases where a CFA had failed to get a result or was deemed too risky even for pursuit under a CFA. Equally, it is clear from publicly available data that Manolete now has the requisite financial support to make offers on a much wider variety and size of claims, particularly bigger claims.

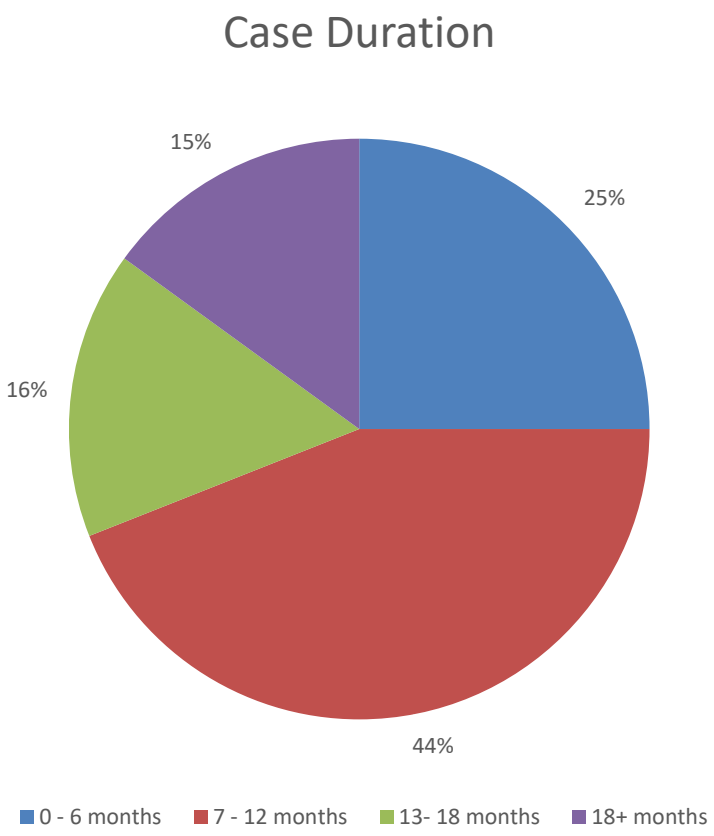


The "Case Type" diagram shows a breakdown of the types of case Manolete Partners plc have taken on either as a funder or by taking an assignment of the action. It should be noted that a number of cases involved more than one cause of action. Where this is so, each cause of action is recorded as a separate case. It is interesting to note that virtually half of the cases involved either a breach of duty by directors (20%) or the non-payment of a director's loan (29%). The often related action for the recovery of unlawful dividends constituted 7% of cases. General breach of contract actions accounted for 15% of cases. The office-holder actions of transaction at an undervalue (13%), preference

(9%) and wrongful trading (4%) were less popular but still made up a significant proportion of actions brought.



Of the completed cases, on average half the proceeds went to the insolvent estate, with the remaining half covering legal costs and profit for Manolete Partners plc. The diagram headed "Total Completed Cases" show the relative percentage of cases with a return to Manolete Partners plc. As can be seen, 17% of cases led to no return with 40% of cases resulting in a return of less than £50,000. At the top end of the market, only 5% of cases led to a return of over £1m. These figures suggest that funders are willing to consider claims of all values, although of course, other variables will affect whether or not a claim is commercially viable.

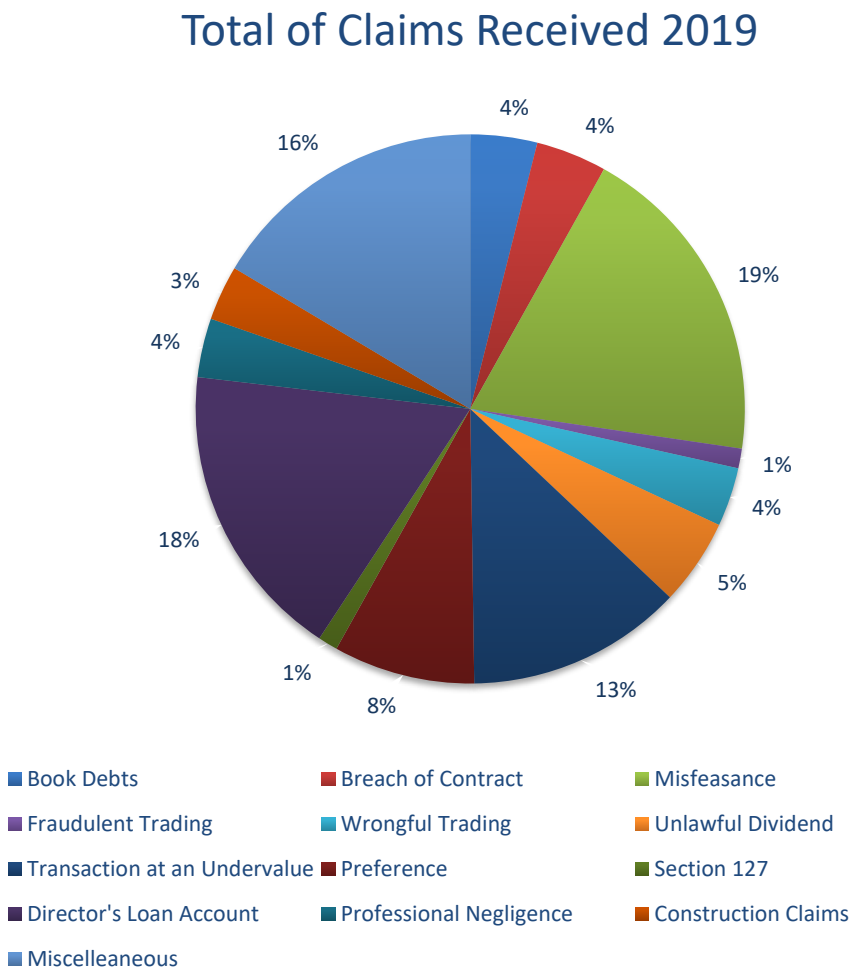


The diagram headed "Case Duration" shows that a quarter of cases are settled or otherwise finalised within 6 months of Manolete Partners plc taking action. A further 44% of actions are finalised between 7 and 12 months. Only 15% of cases continue beyond 18 months. The speed with which cases are settled is often seen as a great strength of using a funder. In cases where a defendant knows the opposition is either funded (or is an assignee funder), the defendant's mind is often concentrated more readily than in cases where an IP office-holder of an impecunious estate is the opponent. Although a settlement may not be for the full value of a claim, the speed with which it is agreed may outbalance a wish to drag out the action for an extended period of time with all the consequent costs which go with such an action. As with all things in insolvency, the answer is getting the balance right. There is a need to maximise returns but not at the expense of running up needless ongoing costs.

Actions Purchased or Funded

It is noteworthy that Manolete Partners plc usually prefers to take an assignment of an action rather than merely agreeing to fund it. Not surprisingly, a funder wishes to have control of any action the funder is bankrolling. A funded action remains under the control of the IP. An assigned action is under the assignee's control. Since the Jackson Reforms became effective in insolvency litigation in 2016, Manolete Partners plc have moved from a position where it took an assignment in approximately half of its cases to a situation where 80% of its cases are now assigned actions. It is also noteworthy

that in its ten year history, over half of its cases have been taken on in the last three years. Its business, and the business of funders generally, has significantly increased since the Jackson Reforms and particularly in the past year during which IPs have become more aware of their options.



The diagram headed "Total of Claims Received in 2019" sheds a good deal of light on the number and value of cases in insolvencies which require funding support. Manolete Partners plc was approached in 2019 with 386 claims representing 432 individual causes of action. The breakdown of different types of claim is shown in the diagram with misfeasance (19%) and unpaid directors' loan accounts (18%) again leading the way. Ignoring the varied Miscellaneous (16%) category, it is Transactions at an undervalue (13%) and Preferences (8%) which are the next most popular actions.

The total value of all of these claims was approximately £900m. This gives some idea of the size of the funded market. It must be borne in mind that a number of these claims are likely to have failed to find funding for one reason or another. Nevertheless, the figure does give an estimate as to the likely potential market for funded claims and appears

comparable to the suggested figure of £720m for the total value of funded claims pursued by funded actions considered above at Question 6 of the survey.

In addition, if the total number of 386 claims considered by Manolete Partners plc in 2019 is considered in light of the total number of corporate insolvencies (16,844[85]) and personal bankruptcies (16,702[86]) where an office-holder might be considering taking action, the estimated number of actions and the estimated value of the funding market appear to seem reasonable. A calculation made by one of the other funders (who was interviewed and whose views are included in the next section) took account of average numbers of insolvencies and average values of actions brought in the Insolvency and Companies List of the Business and Property Courts of England and Wales (and their predecessors) over the past ten years. The average annual amount claimed in such actions over this period was approximately £1.3bn. This figure includes all actions commenced, not just those using CFAs or funding.

If one considers these different sources, it seems likely that the insolvency litigation market (which requires some sort of support or funding) is used to enforce claims of at least £1.5bn per annum.[87]

[85] Figures available from the Insolvency Service show for 2019, compulsory liquidations numbered 2,970, creditors' voluntary liquidations numbered 12,060 and there were 1,814 administrations.

[86] Figures available from the Insolvency Service.

[87] This figure is arrived at by adding the estimated total of claims pursued using a CFA, £800m (taken from Question 2 of the survey above) to the estimated total of claims pursued using a funder, £720m (taken from Question 6 of the survey). If one extrapolates based upon the total number of appointment-taking IPs, 1,236, the total figure is likely to be nearer £3.75bn.

6.3 Interviews of Stakeholders September 2019 – March 2020

6.3.1 Introduction

One of the dangers in relying upon the results of online surveys is that they may not be entirely representative of what is happening. Although the response rate for the online survey was very healthy, those results alone would be unlikely to paint the complete picture. By the very nature of specific survey questions, there is an inherent risk that subtle or complex issues cannot be fully investigated or explained. A number of respondents to the survey agreed to be interviewed. In addition, a number of other stakeholders were identified and approached for interview. Happily, a large majority of those approached were willing to give of their time and expertise in providing their views. A number of IPs, from different sizes and types of firm, were interviewed. A number of solicitors and barristers who specialise in insolvency litigation were interviewed. In addition, a number of funders and insurance brokers were interviewed. It is suggested that the number and variety of those interviewed provides an effective sense check to the survey data and permits a number of specific issues raised to be considered.

The examples provided by some of those interviewed display slight differences in approach by IPs who operate in different parts of the market but, it is hoped, the results provide a reasonably clear picture of the views of the relevant stakeholders. The results of the interviews are discussed thematically below with a focus on what is likely to be in the best interests of creditors.

6.3.2 Changes in practice since Jackson Reforms

It is clear that the Jackson Reforms have had a significant impact upon insolvency litigation with a general consensus that creditors receive a lesser return from legal action than they did before. This was predictable and is one of the obvious consequences of the Jackson Reforms. The expansion of the funding market is also a development which was predictable. Some of those interviewed viewed the effect of the Jackson Reforms to have improved the position of wrongdoers. They have curtailed enforcement action and forced IPs to use funders which, in the view of some, has led to quicker settlements on reduced numbers.

The activities of funders are widely perceived to have increased significantly since the Jackson Reforms. There is a widespread view that there is less litigation at the lower end of the market. Court fees have increased in recent years[88] and the additional costs of the Jackson Reforms with the need to cover the cost of CFA uplifts and ATE

[88] See the Civil Proceedings Fees Order 2008 (SI 2008/1053), Schedule 1 where the fee for commencing an action in the High Court or County Court, if claiming over £200,000, is £10,000. If the claim is for at least £10,000 but does not exceed £200,000 the fee is 5% of the value of the claim.

premiums from any damages have made some claims uneconomic to pursue. The lower end of the market is often seen as uneconomic to insure by ATE insurers. The Jackson Reforms were seen by some of those interviewed as having a "pretty crippling effect" on the number of cases being brought with ATE cover. There is a view that many IPs will try to settle claims before issuing proceedings and therefore before the need for adverse costs cover. One suggested consequence of this is that there are fewer cases which apply for ATE cover and when they do the cost is higher than it was pre-Jackson. The insolvency ATE market appears therefore to have decreased in numbers of claims insured with a consequential decrease in the number of active ATE insurers.

Cases at the bottom of the market are still pursued by IPs, often on the basis of an informal CFA with a familiar legal team. If the action is successful, the lawyers will get paid with no uplift. The lack of an uplift is one of the costs which the Jackson Reforms has taken out of the equation. It was previously common for a 100% uplift to be applied even in a simple case.[89] If it is unsuccessful, the IP and legal team share the pain of the loss of their Work-In-Progress ("WIP"). This type of case is commonly pursued in much the same way as before the Jackson Reforms. The only real difference is that ATE insurance is no longer always acquired, especially where the IP is confident of success. Such claims are at risk of being discontinued if a successful application for security of costs is made by the defendant.[90]

Some IPs did state that they would never take action without the comfort of ATE insurance, even in relatively small cases so there is some divergence of practice at the bottom end of the market. An example was provided by one IP that if there was a claim for £150,000 pursued on the basis of a CFA, if ATE became necessary, that additional cost may make the action uncommercial. In such cases, the IP would therefore consider approaching a funder to try to ensure at least some net return to the estate. That particular IP explained that he or she would take most cases valued up to £100,000, if they were of any complexity, to a funder. In such cases there was likely to be a concern over adverse costs and the cost of ATE in such a case itself might be anything between £25,000 and £50,000. The only realistic possibility of a return to the estate would therefore be to take it to a funder.

It was suggested that many bankruptcy cases fail to provide a dividend for creditors where, for example, the only real asset is a £150,000 share in a matrimonial home. Once all costs and fees are paid, there is frequently little or nothing left for creditors. It would appear that the decision to allow assignability of corporate office-holder actions but not personal office-holder actions is a *lacuna* which might be filled. It is likely that a great deal of smaller claims in bankruptcy, for transactions at an undervalue and

[89] See Section 5 of the 2014 Report and Section 2.1F of the 2016 Update.
[90] See *Absolute Living Developments Limited (In Liquidation) v DS7 Limited* [2018] EWHC 1432 (Ch) where there was no order for security for costs made.

preferences, would be taken up by assignment but are currently often uneconomical for an IP to pursue.

It was generally recognised that funders before Jackson were only offered claims which were difficult or which lawyers had refused to pursue on CFA terms. It was considered by a number of those interviewed that the market is now turned upon its head. Far more cases are offered to funders as a first step. Funders themselves are now able to be more selective than before.

The top end of the market does not appear to be suffering after the Jackson Reforms. Larger cases may be able to be funded by the insolvent estate or will still operate on the basis of CFAs and ATE cover. Insurance will often cover the cost of at least some of the WIP of the IP and legal team. There is some evidence that funders are making inroads to this part of the market.

There are some IPs who have been slow to react to new developments in practice. Not all IPs have changed their practices following Jackson and have continued to pursue legal action largely as before with the use of CFAs and ATE. It therefore remains common for a case valued, for example, at £500,000 to be supported, up to £100,000, by an insurer who will cover fees and expenses and take a multiple of the funding provided if the action is successful. In such cases, lawyers are often instructed under a CFA (with uplift) and ATE insurance is taken. This type of action is conducted much as before the Jackson Reforms, but with a reduced return to the estate and therefore to creditors.

There is some evidence that on occasion a creditor will pay a small amount to allow for some investigatory work to be conducted but will not finance the whole claim. It is common practice for IPs to consult with creditors if legal action is being contemplated and to ask creditors if they wish to fund it. In over 95% of cases the answer is no.

There was a concern expressed that the Jackson Reforms have contributed to a lack of creditor engagement in insolvency processes generally.

6.3.3 Typical Mind Set of IP

It is perhaps a dangerous thing to try to get into the mind of an IP. It is a disparate profession with the activities of some bearing little meaningful comparison with others. There is clearly a difference between an IP who concentrates on multi-million restructuring appointments and a High Street sole practitioner whose case load is mostly small company creditors' voluntary liquidations. They do all have in common fiduciary, statutory and professional duties to conduct appropriate investigations of company participators and to take action, where appropriate, in the best interests of creditors. The following commentary attempts to give a snapshot of how some IPs think.

IPs are very much aware of using CFAs and ATE insurance. Most, but by no means all, have a working knowledge of other options available such as third party funding or assignments of actions. Many IPs will not consider assigning a claim if it is straightforward and the defendant has enough assets to settle any likely award. In such cases, the IP will usually use lawyers on a CFA basis. In more complex cases, the IP has a difficult decision to make. The WIP on a low level but complex case may make it uneconomic for the IP to pursue.

A number of IPs, when presented with a possible cause of action, have as their first thought – can we do it in house and carry the WIP? If an IP has a caseload of, for example, 50 appointments, he or she may not be able to carry a lot of WIP on each case. Some IPs approach this circumstance with more creativity than others. Although most IPs prefer to use an hourly rate basis for their remuneration, some have become more accustomed to agreeing to a percentage of realisations or distributions. This aligns their incentives more readily with the interests of creditors. Some IPs (and others) would like to see DBAs amended to make them a more attractive and realistic option for the remuneration of legal teams. If IPs and lawyers are all engaged on similar contingency terms, (working on a percentage of realisations or distributions with or without the support of an insurer or funder) it is suggested their interests would be better aligned with the interests of creditors.

When an IP runs a claim the risks of not winning are significant. A big concern is the likely length of proceedings which may not fit well with running an insolvency process for any extended period of time. It is not always easy to assess what is in the interest of the creditors. On the one hand, the IP does not wish to allow the insolvency process to run up large continuing costs in the hope of a return but on the other hand, the IP could be criticised for not pursuing the action. If a funder can be used who will fund the action and cover the day-to-day costs of the insolvency process, this is likely to lead to a better result for the creditors than the IP running up a large amount of unpaid WIP and the action eventually being discontinued due to lack of funding. Often creditors are relatively happy to see directors made liable even though there is only a small dividend return to the creditors themselves.

In practice, an IP may not have any real need for funding support until action is actually taken. Even then, an early Part 36[91] offer may lead to resolution. Depending upon whether, and to what extent, the defendant makes an offer to settle, the IP may then consider how much a funder would offer to purchase the action. A reduced offer from the defendant may still be more than the likely realisations from an assignment to a funder. Experienced IPs use all of these tools to ensure they have options and can then make the best decision in the interests of creditors.

[91] CPR 1998 (SI 1998/3132).

Decisions as to whether to use a funder or for the IP to litigate are generally decided on a case-by-case basis. The factors which inform the decision are usually: complexity, value, defendant solvency, legal advice and own WIP and personal costs position.

Quite where the line is drawn between the IP taking action on the basis of a CFA (with or without ATE cover) and using a funder varies from IP to IP and from case to case. Many claims for less than £100,000 are now unlikely to be pursued by an IP unless they are very straightforward. If they are complex they may or may not appeal to a funder. Many IPs will still take on smaller actions and effectively fund the action internally on their own WIP and instruct lawyers on a CFA. Some will use their own firm's money to cover expenses such as court fees. A very small number are more actively engaging as commercial funders. At the other end of the spectrum, some IPs are very risk averse and will not litigate without the support of a funder or ATE insurance to cover any possible adverse costs order.

One IP explained that IPs have "a menu – can creditors fund? Can I do it on a CFA? Otherwise I will consider a funder."

Many IPs emphasised that they act in what they believe to be the best interests of the creditors when making these decisions. They are keen to ensure that creditors are consulted and receive regular reports on the progress of any litigation.

6.3.4 Examples of typical cases and the difficult decisions an IP must make

It was common for IPs who were interviewed to explain the difficult decisions which they often face by providing specific case examples or examples of issues they face.

At the lower end of the market, one IP explained that if there was a simple claim on a director's loan account for £20,000, lawyers would be instructed on an informal CFA without uplift. If ATE became necessary the action would not be pursued as there would be no likely return to creditors.

One IP explained that in general terms, if there is a claim for £30,000 and the likely costs will be in the region of £15,000, action may not be taken as, by the time the IP's costs are factored in, there will be nothing for creditors. If the claim was worth £60,000 and the likely costs were £15,000, it was far more likely that action would be taken.

One example involved a £800,000 claim. Counsel had assessed its likely success to be 65-70%. A CFA with a 100% uplift was agreed with lawyers along with ATE insurance, the consideration for which was deferred. There were no assets in the estate. Creditors were asked if they wished to support the action but they declined. The IP would be criticised if he or she did not take action in such a case. Unfortunately the case was lost and there was no money for an appeal. Everyone concerned had to write off their WIP and the insurer had to cover the defendant's costs. Even if the case had been won, most of the receipts would have gone on costs.

One IP explained that for claims of less than £2m there was always a very difficult decision as to what to do as costs and fees of a court hearing will often use up a good deal of any recoveries. Therefore, if there is a claim for £250,000 and the IP can get £20,000 upfront from a funder (with an agreed percentage of any recovery), this may be enough to cover the IP's own WIP and still possibly lead to a dividend for creditors if the case is a success.

If an IP has a claim for £200,000, it might be that the IP fee would take up £30,000 of that; solicitors perhaps £60,000 on a CFA plus an uplift of a similar amount. With counsel's fee together with an uplift, and ATE if needed, there will be little if anything left for a dividend to creditors. In such cases, the IP needs to consider using a funder as that might lead to a better result for creditors.

A common complaint from IPs related to the cost of ATE insurance. One IP had a claim for £350,000 and was contemplating initiating the action on the basis of CFAs and ATE. The ATE premium would have been £75,000. With the other costs, it made more commercial sense to use a funder where the return to the estate was almost certain to be higher.

A further example given was a live claim in a winding up for £500,000. The estate had no funds. The IP considered instructing lawyers on a CFA basis and taking out ATE insurance. The defendant director was defending. In such a case, it might be better to use a funder to crack a difficult and delaying defendant. The problem was that if, for example, £400,000 was recovered, only about 25% of that would find its way to the estate due to the legal costs and funder's percentage. Although this might be less than one would ideally like, it was certainly going to be better than nothing which would most likely be the case if there was no funding support.

The above examples give an indication of the difficult decision which faces an IP when looking to realise the value in a cause of action. Each case turns on its own facts and different IPs have, legitimately, different views as to what is likely to lead to the best result for creditors. At least one IP interviewed was of the view that insolvency litigation, being inherently public interest litigation, ought to be subject to a system of enforced mediation in cases worth less than £1m with limited disclosure and a listing for a limited time. This would ensure litigation costs were kept down and provide for better returns to creditors.

6.3.5 Comments on use of CFA and ATE insurance

There is a reasonably widespread belief that there are fewer ATE insurers active in the insolvency market than before the Jackson Reforms. A number of those interviewed linked this to the reduction in personal injury claims post Jackson. With less personal injury work available, there is a belief that some ATE insurers have left the market in general or at least reduced their activity. Most IPs interviewed felt that the cost of ATE

insurance had increased significantly following the Jackson Reforms. Some of those interviewed viewed the ATE offering post-Jackson as more realistic. They perceived that ATE insurers are now more careful in providing adverse costs cover. This manifests itself in a delay in IPs receiving an answer to their queries and a common requirement for an upfront payment of at least part of the ATE premium. It was extremely common before the Jackson reforms for ATE insurers not to require any payment upfront with the whole premium deferred and contingent upon success. One ATE broker interviewed contradicted this view by stating that a majority of the 20 or so ATE insurers active in the insolvency market will still provide ATE insurance (within financial limits) with a wholly deferred consideration. Others were of the view that a 10% upfront premium was common. It is likely that both views are true as practice would appear to vary from insurer to insurer and case to case.

Some of those interviewed believed that IPs could generally use ATE more creatively. IPs tend to wait until court proceedings are inevitable to get ATE cover. The cost is higher at this stage than if taken out earlier. If taken out earlier, it may be used to convince a prospective defendant that the IP is serious and this in itself may lead to an early settlement offer without the need to issue proceedings. There is an element of Catch 22 about this conundrum. If ATE is obtained early and the matter does not get to court, creditors may complain that the cost of it was an unnecessary expense. If obtaining ATE is left until later and its costs are therefore higher, again a creditor may complain that it was not acquired earlier.

There was a view that IPs could obtain better ATE cover if they shopped around and negotiated on detailed terms of cover. There was perceived to be a need to ensure that ATE insurers adjust their offerings to be claimant friendly in terms of satisfying an application for adverse costs.[92] Although there is some suggestion that ATE insurers are making this change, the views expressed were not universally convinced that all ATE insurers were providing this type of cover.

A number of advocates of the use of CFA and ATE insurance were of the view that the ATE insurance market was capable of being more flexible than merely covering possible adverse costs. There is an indication that ATE insurers are willing to fund actions in a way similar to commercial funders. They may cover the cost of an IP's WIP and other expenses without requiring an assignment of the action. They may or may not require a payment upfront. Their return will usually be a multiple of the funding provided rather than a percentage of the net damages (assuming success). One broker was of the view that opening the eyes of an IP to the options available was like "extolling the virtues of 5G to a person who still used only a landline telephone".

[92] For examples of the difficulty faced by IPs where an ATE policy is not found sufficient to satisfy an order to cover adverse costs, see *Rowe v Ingenious Media Holdings plc* [2020] EWHC 235 (Ch) and *Re Hotel Portfolio II UK Ltd* [2020] EWHC 233 (Comm).

There was a suggestion that not all CFA contracts are compliant with legislative provisions and that they may in fact amount to illegal contingency or DBA agreements. The most common problem associated by IPs with the use of CFAs was the fact that lawyers will often invest a lot of their own WIP in a case and after a year or two if it has not progressed, it tends to drop to the bottom of their list of priorities. This is not particularly a problem with the CFA model as with the motivation of the lawyers involved. Either way, there is a risk, if an IP uses lawyers who are carrying a lot of WIP on a case, that they may favour early settlement to pay their own costs which may or may not be consistent with the IP's duty to creditors.

6.3.6 Comments on Use of Funders

There was a general view that most funders are nowadays willing to look at cases of any size. It was a common criticism of funders before the Jackson Reforms that they only looked at claims worth millions. There was a view that in many cases, the use of a funder may lead to a better result than using a CFA and ATE insurance. Some IPs look to settle a claim before the need for ATE arises, but once ATE becomes necessary they will then consider a funder instead as the alternative may be better for creditors on the facts.

There was a general view that IPs often follow the advice of their lawyers as to whether or not to use a funder. There is clearly a tendency for IPs and lawyers to have close contacts with one another and with funders. The mutual trust and confidence that has built up in some of these relationships is a factor in deciding which lawyers and funders to approach.

A funder is often approached if the IP believes that the action is too big or too complex to be funded purely on a CFA and ATE basis. Funders were also used by IPs when they sensed an action was becoming too personal. The objective intervention of a funder in such cases was seen as helpful.

Some of those interviewed believed that funding did not yet feel like the norm. Others had a very different view. Some of those interviewed, certainly outside the big commercial cities, were slowly becoming used to the idea of using a funder. The appointment by some funders of well-known regional representatives was encouraging IPs to trust more readily those funders.

One experienced IP commented that the cost of using a funder has not come down with competition but the size and quality of the claim which they are willing to take on has come down.

It is not clear how many funders are currently operating in the insolvency market. One estimate by a broker put the figure at between 60 and 80. Some funders specialise in particular types of claim but most have a more general case load. It appears that there

are a number of well-known and very large undertakings operating but also that there are a number of newer, smaller organisations. A number of IPs commented that their email inboxes are inundated with offers from unknown new funders. One IP commented that there appeared to be almost a two-tier system of funders, whereby if a larger, more established funder said no to a claim, it was picked up by one of the other funders. It is clear that some funders will look at any claim over £20,000 although it is more common for them to look at cases beginning at £50,000. One IP commented that funders are only interested in supporting the best cases but recognised that this was what one would expect from a commercial organisation. A small number of funders are willing to take on riskier cases for greater rewards. The market is developing its own niches.

A number of former practitioners, including both IPs and lawyers, are now entering the funding market by taking assignments of actions and doing much of the work in-house themselves. With ATE cover in place to satisfy any security for costs application, smaller claims may be commercially viable with a reasonable chance of a dividend to creditors.

More than one IP believed that lawyers now more commonly advise an IP to use a funder rather than engage the lawyers on a CFA even where there was a strong case. There was a suggestion of self-interest in operation here in that some funders would ensure full payment of the lawyers' fees as against the uncertainty of a CFA. No funders interviewed found this to be a concern. It was also commented on that the use of a funder often carried less risk to the IP's own WIP. Some funders are willing to cover an IP's WIP in certain cases.

There was a general belief that most funders prefer now to take an assignment of a cause of action and some will only take assignments. Some IPs were concerned by the loss of IP control once the action is assigned. The problem identified was that a funder may wish to settle an action quickly for less than it might generate if it were continued. Although this was a concern expressed, most IPs recognised the need for the funder to make a commercial decision and no-one gave an example where an early settlement had not been in the best interests of creditors.

One IP pointed out that even where a funder is used, there is still often work to do to comply with the requirements of that funder and that the costs of that compliance may amount to tens of thousands of pounds of WIP. The IP did point out that these costs can be managed by ensuring most of the preparatory work is done before approaching a funder or asking the funder for upfront costs of such investigation. Some funders will pay for investigatory work especially in relation to the solvency of a prospective defendant.

One of the benefits of approaching a funder is that if they refuse to support an action, this provides some comfort for the IP who can explain to creditors why no action is being taken.

Overall, most of those interviewed saw funding as a good thing for creditors as more cases are taken up than would otherwise be the case. Even where returns were relatively small, even a small return was better for creditors than none.

Prior to the Jackson Reforms, it was often the case that a lawyer was engaged under the terms of a CFA with a 100% uplift even where the case was quite straightforward. One IP was of the view that a comparable practice might be seen where funders required, for example, 5 times their financial commitment, even where the case was very simple. The IP might be able to find a better deal elsewhere or negotiate better terms with the funder. Funders are seen as commonly requiring a return of 3 times the capital they provide.

Some IPs (and others) expressed concern about the financial strength of some funders. They felt that they were more likely to trust those with financial backing and with a good reputation. Those who were seen as being endorsed by or who had work with professional bodies were more likely to be trusted than newer unknown funders. There were a number of concerns expressed in relation to: who owned some of the funders; their capital value (in case they had to satisfy an adverse costs order; and where the money came from and went to (if the claim was successful).

Although the Government had considered the possibility of the need to regulate funders, there is no legally enforceable regulatory regime in place. There is self-regulatory organisation named the Association of Litigation Funders of England and Wales to which a relatively small number of funders belong. The court has failed to recognise membership in itself as a badge of creditworthiness.[93]

A number of those interviewed explained that having used different funders at different times, their experience has taught them to carry out more rigorous financial due diligence than they did when first using funders. This was to ensure that the funder would be able to satisfy any adverse costs order which might otherwise fall to the IP to satisfy. IPs need to ensure they are not at risk personally if an action is funded or assigned. If they remain financially interested in the action, their residual risk remains. Only if they have sold the action outright does that risk disappear.

A number of funders were characterised by some interviewees as management companies, managing not their own money but money held by large hedge funds. Large cases are often funded through the creation of a Special Purpose Vehicle specially created and funded for that one action. The suspicion is that such funders

[93] See *Rowe v Ingenious Media Holdings plc* [2020] EWHC 235 (Ch) at [137].

appear to be unregulated and if things were to go wrong, it is not always apparent to whom recourse may be had. Those providing insurance are regulated. Funders are not subject to any regulatory regime. There was a concern that some funders may be under capitalised or otherwise be unreliable contractors. Some funders are not seen as having any expertise in the area.

Despite there being suspicions about some funders, others are well trusted and the first port of call for some IPs considering taking action. IPs appreciate that one of the main benefits of using a funder is that the defendant understands how serious the matter is. The "sledgehammer of funding often cracks the nut." IPs appreciate the public policy benefit of taking action in relation to culpable behaviour and that even if the recovery is less than it might have been pre-Jackson, some recovery is better than none. The use of a funder was also recognised by many as providing a far quicker resolution to a dispute than other options. The benefit of such speedy resolution often has the positive side-effect of keeping down overall costs and so leads to a higher recovery. In contrast, it was recognised by some who were interviewed that a legal team instructed on the basis of a CFA will usually benefit more the longer an action continues, with a consequential increase in overall costs.

A number of IPs pointed out that selling an action and asking for funding are conceptually very different. Creditors are owed fiduciary and professional duties by an IP but once the cause of action is assigned to a commercial entity the assignee owes none of those duties to the creditors. The assignee looks to settle an action on the most attractive terms possible, from its own point of view. The IP needs to keep this in mind when considering the terms of any assignment.

6.3.7 Portfolio Funding

There appears to be a debate within the IP profession as to whether it is possible for an IP to enter into a portfolio approach to acquire funding from a funder. The idea is that an IP may need a line of funding available across a number of actions covering a number of insolvent estates. There appears to be a lack of consensus as to how such portfolio agreements work.

There is a view that their effect is that the proceeds of any claims that are successful may be used to cover the cost of funding across the whole portfolio. If the effect of such an agreement is that money belonging to one insolvent estate (and therefore held for the benefit of one group of creditors) is used to pay for the costs of litigation brought on behalf of a different insolvent estate (and therefore a different group of creditors), the IP would appear to be acting in breach of duty. It may be possible that such portfolio agreements can be made to work, where the creditor or creditors are the same in different insolvent estates (HMRC, for example), and such creditors provide their fully informed consent to the process.

An alternative and more reasonable version of portfolio funding is that where an IP requires funding across a number of cases, the costs of that funding may be brought down for individual cases, where an agreement across a broader portfolio can be agreed. In such circumstances, there appears to be no question of the proceeds of a successful case being used to pay the costs of an unsuccessful case. This appears to be one option which IPs use to cover the costs of their own WIP across a group of cases.

6.3.8 Knowledge of the Market Ensuring Best Interests of Creditors

It is clear that some IPs are very sophisticated users of funding and legal services and fully understand how they need to conduct themselves in order to satisfy their duties to creditors. A strong message which came out of the interview process was that the IPs interviewed did, without exception, have a very strong understanding of their duties. They were very conscious of the need to ensure their decision was in the best interests of creditors. Their actions were motivated by what would most likely lead to the payment of a dividend to creditors. This commitment to creditors was clear when talking to, at one end of the profession, senior partners in very large IP firms and, at the other, sole practitioner IPs.

However, it is clear from the interviews that the IP profession is a broad church. There is a reasonably widespread belief that some IPs do not fully understand the options open to them when considering how to finance a legal action. Some of these IPs are risk averse and are generally reluctant to bring litigation. In a similar vein, some IPs are reluctant to take appointments which "look or smell wrong". Some IPs rely upon work from directors of companies and, for a variety of reasons, may be slow to initiate actions against those directors in a subsequent liquidation. Hostile appointments are quite rare in practice and so there is often a (limited) pre-existing relationship between the IP and directors. Some IPs suspect that in such cases, any investigation is likely to be reasonably swift and may not be as rigorous as creditors might wish. IPs in such cases need to be clear that their duty is to the creditors. They do not owe any duty to the directors (even if the directors are underwriting their fees in some capacity).

In cases where taking action becomes inevitable, IPs are naturally keen to ensure certainty as to their own position. IPs rely upon the legal advice they receive as to how to deal with a potential cause of action. Legal advice is usually a significant factor in any decision-making process. An assignment to a funder is often a very attractive option for such IPs. It is, of course, necessary for such IPs to be confident that their decision-making is in the best interests of the creditors, not just in the best interests of the IP or the lawyers.

There was some anecdotal evidence that some IPs invite funders to look over their files in order to identify whether there are any likely causes of action which could be taken to swell the assets of the estate. Whilst this activity suggests that the IPs in question

have not satisfied their duties to their creditors fully, it may actually point in the other direction. If an IP is not convinced an action is viable, if a funder disagrees, and is willing to fund, or take an assignment of, a cause of action, the result may be a return to creditors where no return would otherwise be possible. This practice might be worth considering by IPs who do not have the investigatory skills or experience of some of the funders.

It was considered by some interviewed that R3 and the professional bodies have failed their members by not providing clear guidance on the options available to them. The view was also expressed that if professional and trade bodies frequently hold events sponsored by certain funders, this provides a vote of confidence in favour of those funders which IPs take as a recommendation. This criticism is arguably based upon a failure by those who favour other ways of supporting insolvency litigation to get their message across to the profession. It is certainly the case that funders such as Manolete Partners plc have invested often, in sponsoring all kinds of insolvency related events. Their brand recognition is high amongst stakeholders due partly to these activities. It is a marketplace where it is incumbent upon all players to make their products known. Those offering different funding products need to make those products better known in order to convince the profession that they are viable as an alternative. A central comparison service where different products and different funding options may be considered by IPs would be extremely useful.

The funding market appeals to a number of different types of IP. One concern expressed was that too many IPs see funding as an easy way to cover their own WIP and to pay a dividend by giving all the work away to the funder. IPs ought to ensure that they consider alternative options when looking to fund an action. They ought to document their decisions so that it is clear that they have not merely repeated their common practice of approaching one firm of solicitors and one funder. Solicitors want to get paid their fees. If they recommend a funder who covers their fees, they must still be able to show that they are acting in the best interests of their client.

6.3.9 Official Receiver, HMRC and Secretary of State

A number of those interviewed were of the view that the Official Receiver could do more to encourage returns to creditors. When acting as liquidator or trustee in bankruptcy, there was a general view that the Official Receiver is reluctant to take action on behalf of creditors. Funders are keen to work with the Official Receiver on such cases. In cases where attempts are made to appoint a private sector IP to replace the Official Receiver, it is claimed that the Official Receiver, often with the support of HMRC as the majority creditor, prevent such appointments.

The Secretary of State (or the Official Receiver) may also consider using more widely the powers under section 15A of the Company Directors Disqualification Act 1986

which allow for the court to order compensation against a disqualified director.[94] It seems strange that the Secretary of State often expends great time and money in disqualifying an individual and does not also request a compensation order. Some reasonable liaison with IPs might lead to significantly greater returns to creditors with relatively little extra effort.

There would appear to be a case for the Official Receiver to consider how the duty to act in the best interests of creditors may be satisfied in such cases either by taking action, assigning action or appointing different office-holders.

[94] At the time of writing there has only been one case reported under section 15A: *Re Noble Vintners Ltd* [2019] EWHC 2806 (Ch).

7 Summary of Main Findings

1 Although the Jackson Reforms have had a significant impact upon how insolvency litigation is funded, their effect has not been as serious as some had predicted.

2 The overall value of claims being pursued using different forms of support (whether CFAs, ATE, funding or assignment) is likely to have increased since 2015 from approximately £1bn to nearer £1.5bn[95] per annum.

3 IPs and their advisors are very aware of their duty to act in the best interests of creditors.

4 The funding and assignment market is still developing but has increased significantly in the past 4 years.

5 Many IPs are sophisticated users of funding and legal options whilst others remain inexperienced and are not yet fully informed of the options available to them.

6 Each case needs to be considered individually as to how its progress may result in the best result for creditors.

7 There is a potential lack of transparency with the identity and creditworthiness of some insurers and funders.

8 The funding and assignment marketplace is becoming more varied with some niche specialisms developing.

9 ATE (and other) insurers need to react to changes in the marketplace.

10 Government agencies including the Official Receiver and HMRC could do more to encourage the pursuit of culpable behaviour and to co-operate more with the private sector.

[95] If one extrapolates from the survey results based upon the total number of appointment-taking IPs, 1,236, the total value of claims being pursued per annum may be as high as £3.75bn.

8 Recommendations

It is clear that things have moved on since my last report in 2016. The use of CFAs and ATE insurance continue to be very important tools for IPs. Funding and assignments of actions are now an integral and important part of the system and ought to be considered by IPs when considering enforcing any cause of action. Despite these developments, it seems that the costs of CFAs and ATE on the one hand and Funding and Assignments on the other have remained high. Competition has not yet had the desired effect of maximising returns to creditors. This may be partly because the market is not yet operating in a fully-informed manner. As its users become more informed they are likely to become more efficient users of the market.

In considering statutory changes, case law developments and the practical reactions to them, of insolvency professionals and the funding and insurance market, a number of observations may be made which may assist in ensuring that more is done to satisfy the duty to act in the best interests of creditors. Guidance might be issued to IPs in the form of a Statement of Insolvency Practice or Guidance Note dealing with specific issues they need to consider when conducting litigation. That guidance might cover the following:

1 There is a need for IPs to be provided with guidance as to the options open to them when contemplating taking legal action;
2 That guidance needs to explain the benefits and risks of each option;
3 IPs need guidance on the due diligence they need to conduct when instructing lawyers on a CFA basis and when using ATE insurance to cover any adverse costs award;
4 Whether or not the funding market remains unregulated, IPs need to be made aware of the due diligence they need to carry out when working with a funder;[96]
5 There is a need for a mechanism whereby IPs might be able to obtain multiple quotations from funders for supplying funding or taking an assignment.

In order to maximise returns to creditors a number of other changes might be considered:

1 The rules on DBAs could be amended to make them fit for purpose in an insolvency context;
2 The maximum percentage uplift on a CFA could be increased for insolvency litigation;

[96] The types of question they might wish to ask are reproduced in Appendix 1. I am very grateful to Steven Cooklin of Manolete Partners plc for producing this checklist.

3 Bankruptcy office-holder actions should be made capable of assignment to mirror the position in corporate insolvency;

4 The Official Receiver should consider working more closely with the private sector and consider taking advantage of assigning (or otherwise realising) claims for the benefit of creditors;

5 The Secretary of State should consider liaising more closely with the private sector to apply for more compensation orders, in appropriate cases, under the Company Directors Disqualification Act 1986.

Appendix One

Suggested Checklist When Using a Funder or Assignee

1. Does the Funder have a demonstrable track record in financing insolvency litigation claims?
2. What is the minimum case size the Funder will consider?
3. Is the finance provided open-ended or subject to a defined limited commitment by the Funder?
4. Is a counsel opinion essential for my case to be considered?
5. Does the Funder offer an assignment option or funding only?
6. Can I retain a % interest in the final outcome?
7. Can I sell the claim in its entirety at the outset, taking a single one-off payment into the Estate?
8. Does the Funder provide me and the Estate with a clear and full adverse cost indemnity or do I need to source ATE as well?
9. What is the financial strength of the Funder that backs its indemnity and will that satisfy any Security for Costs issue?
10. Do I get to choose the legal team who work on this case going forward?
11. Where I have assigned the case: will I remain involved or at least be kept regularly informed of progress on the case? Can I participate in any ADR meetings if I choose to do so?
12. Can I receive some money into the Estate upfront to defray some/all of my and my lawyer's WIP and how do I recover any remaining outstanding costs incurred prior to the assignment/funding agreement?
13. Will the legal team have to work on a full or partial CFA or do they get paid as the work is completed, at base rates?
14. Can the IPs' litigation support/further investigation costs be covered by the Funder?
15. What % of the final recovery will the Estate get? Does that % increase as the recovery level increases?